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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~628~~ 41

LESLIE T. ALWARD, PETITIONER,

vs.

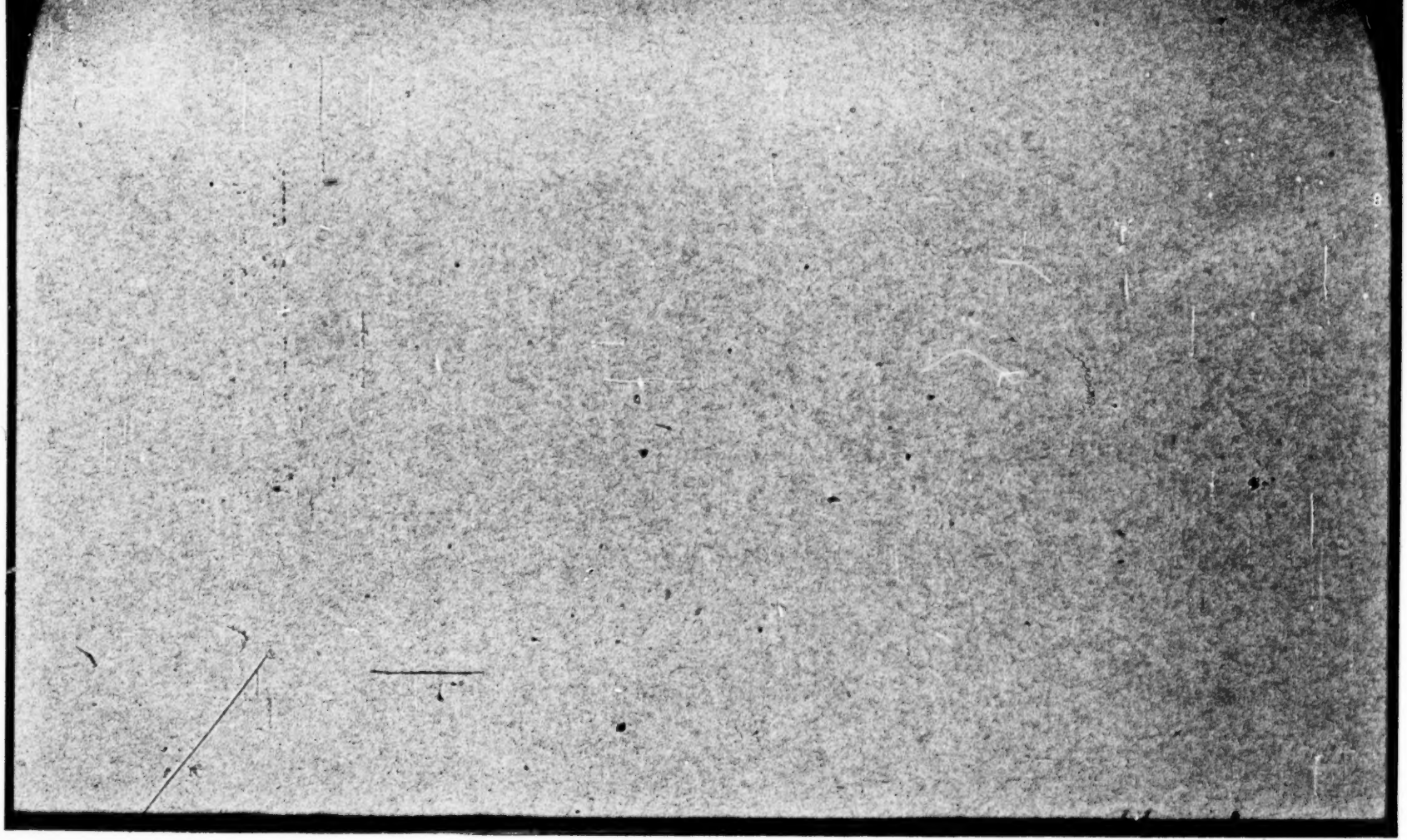
C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1930

CERTIORARI GRANTED MARCH 17, 1930

(34,759)



( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No.

LESLIE T. ALWARD, PETITIONER,

vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Record from superior court of Sacramento County	1	1
Third amended complaint	1	1
Demurrer	8	5
Judgment	9	5
Notice of appeal	10	6
Clerk's certificate (omitted in printing)	11	
Judge's certificate (omitted in printing)	12	
Proceedings in supreme court of California	13	7
Opinion, Waste, J.	13	7
Petition for rehearing (omitted in printing)	19	
Order denying rehearing	22	11
Clerk's certificate (omitted in printing)	22	
Order allowing certiorari		13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 3, 1930

[fol. 1] **IN SUPERIOR COURT OF SACRAMENTO COUNTY**

No. 38864

LESLIE T. ALWARD, Plaintiff,

vs.

C. G. JOHNSON, Treasurer of the State of California, Defendant

THIRD AMENDED COMPLAINT—Filed May 25, 1928

Plaintiff complains of defendant above named, and for cause of action, alleges:

I

That at all times herein mentioned, C. G. Johnson was and is the duly elected, qualified and acting Treasurer of the State of California, holding office under and by virtue of the laws thereof.

II

That Leslie T. Alward, the plaintiff herein, at all the times mentioned herein has been, and now is, engaged in the business of operating an automotive stage line known as the Redding-Weaverville Stage Line, between Redding California and Big Bar California, by virtue of a contract entered into with the Post Office Department of the United [fol. 2] States Government, and at all times has been, and now is, carrying United States Mails and Parcels Post on said stage line. That in carrying said United States mail, the plaintiff herein employs motor vehicles.

III

That the State Board of Equalization of the State of California, under the provisions of Article XIII, Section 15, of the Constitution of the State of California, and Chap-

ter 19, Statutes 1927 of the State of California, has required the said Leslie T. Alward to file with the State Board of Equalization a report, as provided for in the said Acts, showing the gross receipts derived by the said Leslie T. Alward from the operation of the said stage line for the year 1926, including receipts for the carriage of United States mails and parcels post; that the gross income of the plaintiff herein was in the following amounts:

Revenue derived from the carriage of passengers	$8,803.31
Revenue derived from the carriage of freight	9,806.43
Revenue derived from the carriage of United States mail and parcels post	42,286.73

That thereupon, and based upon the foregoing receipts, the said State Board of Equalization, assessed the plaintiff herein, under the aforesaid acts, the following sums as a tax to be paid by the plaintiff for the year 1927:

On the gross income derived from passengers	$374.14
[fol. 3] On the gross income derived from U. S. mail	2,114.32
On the gross income derived from Freight	490.32

That plaintiff herein has paid the sum of One Thousand Four Hundred Eighty-nine and 39/100 ($1,489.39) Dollars, being one-half, or the first installment of the said tax. Said payment was made under protest, and was paid to prevent being harrassed, annoyed and prosecuted under the said act; and to prevent the property of the plaintiff from being seized and taken away.

V

That in earning the revenue above set forth, plaintiff has employed the following automotive property, and no other:

One three and one-half ton Garford truck, three two and one-half ton Garford trucks, three seven-passenger Paige automobiles, one seven-passenger Paige automobile, two one and one-quarter ton Reo Speed Wagons, one one and one-quarter Garford Speed Wagon, one one-half ton trailer,

one snow plow, one oil tank and pump, one garage and the machinery and tools in connection therewith.

That in earning said revenue, plaintiff has employed the following equipment which is not automotive:

Fourteen horses, twelve double sets of harness, five two-ton freight wagons, four mail wagons, one bob sled, equipment for one office, consisting principally of one adding machine, one typewriter, one desk and office chairs, two parcels of real estate, one situated in Shasta County and one situated in Trinity County.

That the actual market value of all the above mentioned property does not exceed the sum of Fifteen Thousand ($15,000) Dollars.

[fol. 4]

VI

That the said property is devoted chiefly to the carrying of United States mails and parcels post, and has no value in excess of its actual market value by reason of any franchise or intangible value connected therewith or by reason of being part of any system capable of earning more than other property of like kind, character and value, and that the plaintiff's ability to earn more with this property than any other property of like kind and character and earn more than any other person could earn with the same property is only and solely by reason of the fact that the plaintiff has a contract with the United States Government for the carrying of United States mail and parcels post. That without the said contract with the United States Government, the said stage line could not be operated profitably, as the income from all sources, other than the revenue derived from the carriage of United States mail and parcels post is not sufficient to pay the expenses of maintaining and operating the said stage line.

VII

That the assessment made by the State Board of Equalization is confiscatory, arbitrary and excessive, and does not take into consideration the actual value of the afore-

said property, either as a stage line, or otherwise; and that the State Board of Equalization in fact, in fixing the valuation on the said property considered no other elements of [fol. 5] value with reference to the said property, except its gross earning as aforesaid. That the tax rate on property generally, taxed on the ad valorem basis in the counties in which this property is situated and at the time the said tax was levied, did not exceed the rate of three per cent (3%) per One Hundred Dollars ($100.00); and that prior to the adoption of Section 15, Article XIII of the Constitution, and under the ad valorem method of valuing property for taxation the plaintiff never paid in excess of Three Hundred Fifty Dollars ($350.00) per annum as a tax on all of the aforesaid property. That the replacement cost of all of the property used by the plaintiff in complying with the terms of the said contract with the United States Government does not exceed the sum of Fifteen Thousand Dollars ($15,000.00); and that taxed on the ad valorem basis the aforesaid property would have to be valued at Ninety-nine Thousand Four Hundred Sixty-two and 73/100 Dollars ($99,462.73), in order to arrive at the property tax assessed the plaintiff herein.

That in carrying the United States mail and parcels post the plaintiff herein is acting under a contract with the Post Office Department of the United States Government and for this purpose is an agency of the United States Government; that the income derived by the plaintiff from the carriage of United States mail and parcel post is not subject to a tax by the State of California, and that the said tax under the aforesaid acts insofar as it is based upon the [fol. 6] revenue derived by this plaintiff from the carrying of United States mail and Parcel Post has been wrongfully and unlawfully assessed to this plaintiff and the first installment thereof in the sum of One Thousand Fifty-seven and 16/100 Dollars ($1,057.16) has been wrongfully and unlawfully collected from this plaintiff and should be repaid to this plaintiff, and this plaintiff should be relieved from any other or further payment on account of any tax based upon the plaintiff's receipts from the carriage of United States mail and Parcel Post.

Wherefore the plaintiff prays judgment agains- the said defendant in the sum of One Thousand Fifty-seven and

16/100 Dollars ($1,057.16), for the costs of suit herein incurred and for such other and further relief as may be necessary in the premises.

S. G. Blood, Simeon E. Sheffey, Attorneys for Plaintiff.

[fol. 7] *Duly sworn to by S. G. Blood. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 8] IN SUPERIOR COURT OF SACRAMENTO COUNTY

DEMURRER TO THIRD AMENDED COMPLAINT—Filed June 1, 1928

Now comes the defendant named in the above entitled action and demurring to the third amended complaint herein filed by the above named plaintiff, alleges, as grounds of demurrer, that plaintiff's third amended complaint does not states facts sufficient to constitute a cause of action against said defendant or against the State of California.

Wherefore, defendant prays that plaintiff take nothing by his third amended complaint and that defendant have judgment for his costs of suit incurred herein.

U. S. Webb, Attorney General of the State of California; Frank L. Guerena, Deputy Attorney General, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 9] IN SUPERIOR COURT OF SACRAMENTO COUNTY

Decree entered Aug. 30, 1928, at 9:50 o'clock A. M., Dept. 2.

JUDGMENT—Filed Aug. 29, 1928

The plaintiff having filed in the above entitled matter his Third Amended Complaint, and the defendant above named having filed herein his Demurrer to said Third Amended Complaint, said Demurrer to said Third Amend-

ed Complaint having been regularly submitted to this Court by stipulation of the parties, and this Court being fully advised in the premises, and having sustained the demurrer to said Third Amended Complaint, without leave to amend,

Now, therefore, it is

Ordered, adjudged, and decreed that plaintiff take nothing by his said action, and that defendant herein recover from plaintiff his costs of suit herein incurred.

Peter J. Shields, Judge of the Superior Court.

Attest: Harry W. Hall, Clerk; by W. Hickey, Deputy Clerk.

[fol. 10] In Superior Court of Sacramento County

Notice of Appeal—Filed Sept. 7, 1928

To the clerk of the above-entitled court and to C. G. Johnson, Treasurer of the State of California, and to U. S. Webb, Attorney General of the State of California:

You and each of you will please take notice that Leslie T. Alward plaintiff in the said action, hereby appeals to the Supreme Court of the State of California, from the judgment rendered in the above action against said plaintiff that he take nothing and that defendant herein recover from plaintiff his costs of suit herein incurred, which said judgment was entered in the above-entitled Court on August 30, 1928, and said plaintiff appeals from the whole of said judgment.

Sherman Blood, Simeon E. Sheffey, Attorneys for Plaintiff.

Dated September 6th, 1928.

[File endorsement omitted.]

[fol. 11] Clerk's certificate to transcript omitted in printing.

[fol. 12] Judge's certificate to foregoing transcript omitted in printing.

[fol. 13] IN SUPREME COURT OF CALIFORNIA. IN BANK

Sac. No. 4261

LESLIE T. ALWARD, Plaintiff and Appellant,

vs.

C. G. JOHNSON, Treasurer of the State of California, Defendant and Respondent

Appeal by plaintiff from a judgment of the Superior Court of Sacramento County, Peter J. Shields, Judge, in an action for taxes paid under protest. Affirmed.

For Appellant: Simeon E. Sheffey, Sherman Blood.

For Respondent: U. S. Webb, Attorney-General; Frank L. Guerena, Deputy Attorney-General.

OPINION—Filed October 7, 1929

Plaintiff was engaged in the business of operating an automotive stage line over the public highways between Redding and Big Bear, California, carrying passengers, freight, the United States mail and parcels post. He was, therefore, subject to a tax on gross receipts from the carriage of persons and property, in lieu of all other taxes and licenses. (Const., art. XIII, sec. 15.) He filed with the State Board of Equalization a statement showing gross receipts from the operation of his transportation line for the year 1926 amounting to $60,986.47. On the basis of that statement, and pursuant to the Constitution, supra, the board levied a tax of $2,978.78 for the year 1927. Appellant paid the first instalment under protest, and brought this action to recover $1,057.16, the portion of the tax assessed against the revenue derived from the carriage of the United States mails and parcels post. A demurrer inter-
[fol. 14] posed to his third amended complaint was sustained without leave to amend, and judgment was entered accordingly, from which the plaintiff has appealed.

Appellant attempts to raise questions concerning the method of taxation adopted by the people of the state in 1910, by which the system of state and local taxation was

separated, which were long ago settled against his contentions. He first asserts that the actual market value of the various units of property used in the operation of his stage line is not more than $15,000, and that prior to the adoption of section 15, supra, the ad valorem tax on his property never exceeded $350 per annum. He therefore claims that, as applied to his property, the prescribed method of taxation results in an arbitrary, excessive and confiscatory tax, violative of the Fourteenth Amendment to the Federal Constitution. He further contends that, inasmuch as the tax is not based upon the true valuation of his property, it ceases to be a tax on property and becomes a direct levy upon appellant's contract to carry mails for the United States government, and is, therefore, a tax on a federal agency.

(1) The question as to whether or not the taxes levied for state purposes by section 14 of article XIII, upon the gross receipts of the utilities there enumerated, are taxes upon property has several times been considered by this court, and in each instance it has been declared to be essentially a property tax. (Pullman v. Richardson, 185 Cal. 484, 487, 197 Pac. 346 affirmed in 261 U. S. 330, 339, and [fol. 15] cases there cited.)

(2) The tax required by section 15 of article XIII of the Constitution on the gross receipts of appellant's business is the identical kind of a tax required by section 14, and is, like the other, essentially a property tax. It is neither arbitrary, excessive or confiscatory to the extent of rendering it violative of the due process clause of the fourteenth amendment to the federal Constitution.

(3) The second main contention of appellant is that he carries the United States mails and parcels post under a contract with the Postoffice Department of the United States Government, and for that purpose is an agency of the government, and, as such, immune from state taxation. He cites cases in which the courts have denied the state the right to collect taxes upon transactions in which the federal government is directly engaged (e. g., Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 48 Sup. Ct. Rep. 451.) But there is a very material difference between such transactions and

one in which a private citizen, whose only relation to the government is that of contract, is under obligation to furnish service in accordance with that contract. "Mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control." (Metcalf and Eddy v. Mitchell, 269 U. S. 514.) In that case, involving a tax on the income of consulting engineers in state service, the court, speaking through Mr. Justice Stone, said: "* * * not every person who uses his property [fol. 16] or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule (citing cases).

"'It seems to us extravagant to say that an independent private corporation for gain created by a State, is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.'"

In Railroad Co. v. Peniston, 18 Wall. (85 U. S.) 5, it was claimed that the state of Nebraska had illegally imposed a tax upon the property of the railroad company, the contention being that the property was exempt from state taxation by virtue of the incorporation of the company by the United States as a means for the performance of certain public duties of the government, enjoined and authorized by the Constitution. In considering the contention, the court said (p. 33):

"It may, therefore, be considered as settled that no constitutional implication prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it [fol. 17] is not only used, but is is necessary for their

agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service * * * They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands of by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest that State governments would be paralyzed."

(4) In his closing brief, appellant for the first time, raises the point that section 15 of article XIII, supra, applies only to common carriers. He contends that the general definition of a common carrier, i. e., "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place" (10 Cor. Jur. 39), is not applicable to one engaged in carrying the United States mails. In his third amended complaint filed in this action appellant alleged that he was "engaged in the business of operating an automotive stage line known as the Redding-Weaverville Stage Line, between Redding, California, and Big Bar, California * * *," and that the property used in the operation of the line was "devoted chiefly to the carrying of United States mails and parcels post." An examination of his report filed with the board of equalization shows that of the $60,986.47 reported as earned dur- [fol. 18] ing the year 1926, $18,609.74 was revenue derived from the carriage of passengers and freight. There is nothing in appellant's complaint, or in the briefs filed in his behalf, which would indicate that he did not undertake, for hire or reward, to transport from place to place passengers and the goods of such as chose to employ him. His stage line was operated over the public highways, between fixed termini, and over a regular route. It is true his property was largely employed in the service of the United States; but that does not alter the fact that it was also devoted to public service, and, as was said in Metcalf and Eddy v. Mitchell, supra, it would seem extravagant to say "that an independent private corporation for gain created by a State, is exempt from state taxation * * * in * * * its property, because it is employed by the United States, even if the work for which it is employed is impor-

tant and takes much of its time." While appellant's complaint is directed only to the portion of the tax based on the receipts from the carriage of the mails, the tax, as before pointed out, is a tax on the operative property "used in the business of transportation of persons or property," without distinction as to the nature of the property transported.

The judgment is affirmed.

Waste, C. J.

We concur: Curtis, J.; Preston, J.; Richards, J.; Seawell, J.; Langdon, J.

[File endorsement omitted.]

[fols. 19-21] Petition for rehearing, covering three pages, filed October 26, 1929, omitted from this print. It was denied and nothing more by order November 4, 1929.

[fols. 22 & 23] In Supreme Court of California

Order Denying Rehearing—Filed Nov. 4, 1929

By the Court:

The petition for a rehearing herein is denied. (All concur.)

Waste, Chief Justice.

Dated Nov. 4, 1929.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[Seal Supreme Court of California]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 17, 1930

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2992)

FILE COPY

FEB 4 19[illegible]
CHARLES E[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~628~~ 41

LESLIE T. ALWARD, PETITIONER,

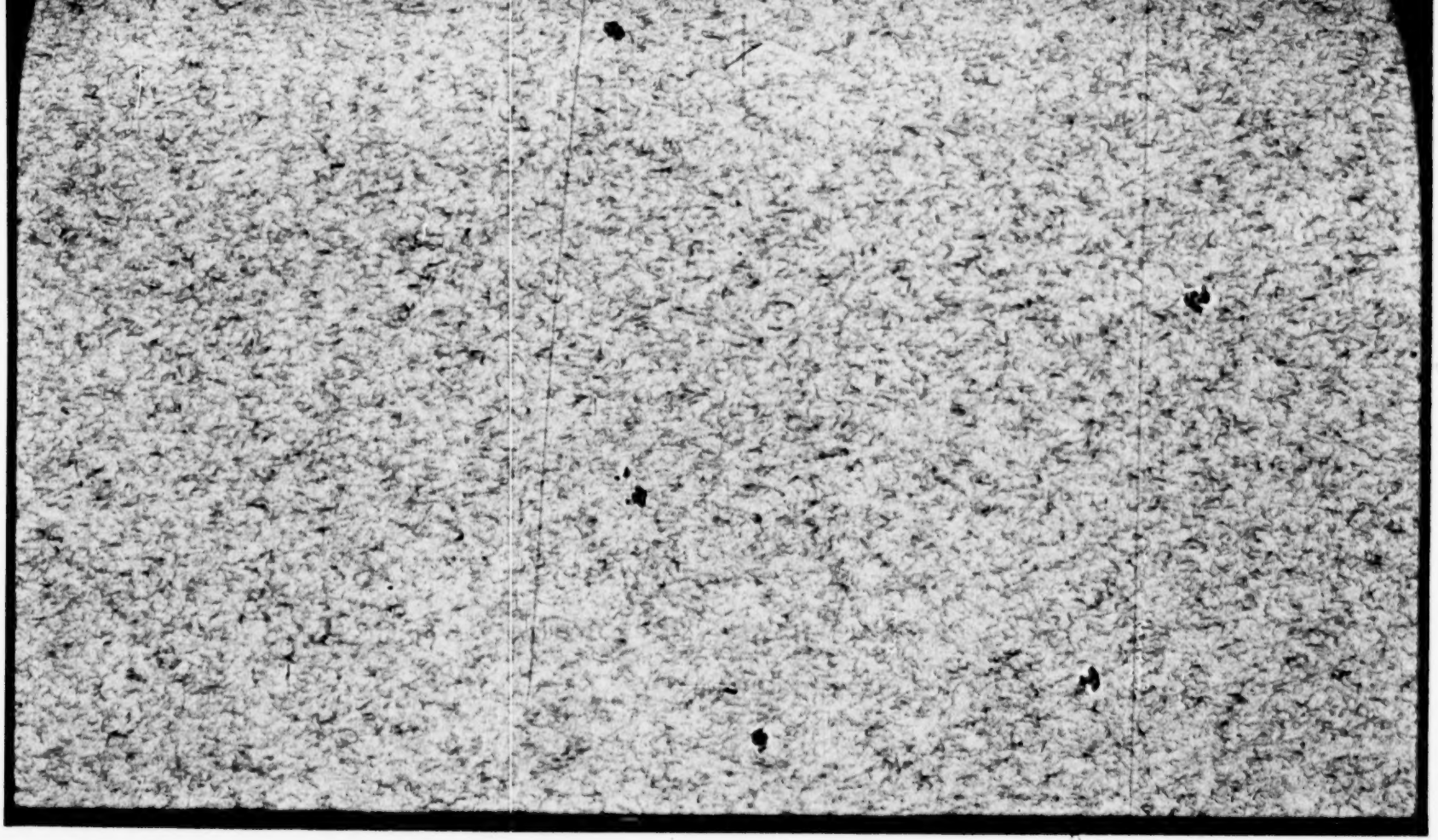
vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

BURKE CORBET,
Crocker-1st National Bank Building,
San Francisco, California;
SIMEON E. SHEFFEY,
904 *Hunter Dulin Building,*
San Francisco, California,
Solicitors for Petitioner.

(34,759)



INDEX.

Subject Index.

	Page
I. Opinion of the court below	7
II. Jurisdiction	8
III. Statement of the case	8
IV. Argument	8
A. The tax in question is a direct tax upon a Federal mail contract and is a tax upon the means employed by the Federal Government to exercise its constitutional powers	8
B. The tax as levied is arbitrary, confiscatory, and constitutes the taking of property without due process of law	17
1. The gross-receipts tax on highway transportation companies is essentially a tax upon operative property and is not a tax on gross receipts or income of such property	17
2. The gross-receipts tax is intended to be approximately the equivalent of an ad valorem tax on the property at a given rate. It was fixed so as to make the tax the equivalent as a fair tax value on all operative property in use at its value	19
3. A plan of taxation that is arbitrary and the valuation grossly excessive is in violation of the Fourteenth Amendment of the United States Constitution	23
Conclusion	32

Table of Authorities Cited.

Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed., 434; 54 C. C. A., 608; 65 L. R. A., 397 (aff. 113 Fed., 414)	30
Bolan v. Williamson, 2 S. C. L., 551	31
Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa, 423; 92 N. W., 88; 59 L. R. A., 796	31

Page

Central R. Co. v. Lampley, 76 Ala., 357; Am. R., 334..... 31
Commonwealth of Pennsylvania v. Lehigh Valley Railroad Co., 4 Dauphin County Reports, 174..... 16
Conwell v. Voorhees, 13 Oh., 523; 42 Am. D., 206..... 31
Dunlop v. Munroe, 7 Cranch, 242; 3 L. Ed., 329..... 30
Foster v. Metts, 55 Miss., 77; 30 Am. R., 504..... 31
Frost v. Railroad Comm., 197 Cal., 230; 271 U. S., 583..... 28
Graysburg Oil Co. v. Texas, 278 U. S., 582..... 12
Edward W. Hopkins v. So. Cal. Telephone Co. and The Pacific Telephone & Telegraph Co., 275 U. S., 393..... 21
Hutchins v. Brackett, 22 N. H., 252; 53 Am. D., 248..... 31
Louwein v. Moody, 12 S. W. (2d), 980..... 12
Metcalf & Eddy v. Mitchell, 269 U. S., 514..... 13
Panhandle Oil Co. v. Mississippi, 277 U. S., 218..... 12
People of the State of N. Y. v. Jacob A. Cantor, 236 N. Y., 417.. 14
Powell v. Mills, 30 Miss., 231; 64 Am. D., 158..... 31
Pullman Co. v. Richardson, 185 Cal., 484..... 18, 19, 25
Railroad Co. v. Peniston, 85 U. S., 5..... 8, 14
San Francisco v. Western Union Tel. Co., 96 Cal., 140..... 12
Schroyer v. Lynch, 8 Watts, 453..... 31
Telegraph Co. v. Texas, 105 U. S., 460..... 12
Union Tankline Co. v. Wright, 249 U. S., 275..... 26
Western Union Tel. Co. v. City of Richmond, 26 Grat., 1..... 11
Wiggins v. Hathaway, 60 Barb., 632..... 31

CONSTITUTIONAL REFERENCES.

Section 15, Art. XIII..... 17, 27
Section 14, Art. XIII..... 19

REPORTS.

State Board of Equalization, 1912, pp. 7-8..... 20

TEXTBOOKS.

2 Camp. Comm. (12th Ed.), 610..... 30
10 C. J., 39..... 27
10 C. J., 52..... 30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 628

LESLIE T. ALWARD, PETITIONER,

vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Leslie T. Alward respectfully shows to this Honorable Court:

I.

Summary and Short Statement of the Matter Involved in This Case.

Leslie T. Alward, petitioner, is engaged in carrying United States mails and parcels post between Redding,

California, and Big Bar, California, under a contract entered into by petitioner with the Post Office Department of the United States Government. On November 2, 1926, the people of the State of California adopted Section 15 of Article XIII of the Constitution of the State of California. By the terms of this section, highway transportation companies are taxed a percentage of their annual gross receipts in lieu of all other taxes as a tax upon the physical property of motor carriers operating within the State of California where such motor carriers are operating as *common carriers*. Pursuant to the provisions of this section, the State of California assessed and collected a tax against your petitioner herein at the rate provided for in said section and statutes passed by the Legislature of the State of California pursuant thereto, said statutes being Sections 3664*aa*, 3670*bb*, and 3670*cc* of the California Political Code, being also Ch. 19, Stat. 1927. In levying this tax against your petitioner herein, the State of California required your petitioner to report the amount of gross receipts received by your petitioner during the year 1926 from all sources, such as freight and passengers and including receipts for the carrying of United States mails and parcels post pursuant to the contract under which your petitioner herein was carrying said mails and parcels post. Upon the basis of the total of such receipts, your petitioner was taxed at the rate of 5 per cent of said gross receipts pursuant to said acts and statutes. Your petitioner herein paid the tax as levied under protest, claiming that the inclusion of gross receipts from

United States mails as a basis for the fixing of the amount of said tax was unlawful as violative of the United States Constitution, and that the amount of the tax as assessed was excessive and arrived at in an arbitrary manner, and far greater than the tax assessed against property similar to petitioner's but not so employed. Thereupon petitioner herein sued to recover a portion of said taxes so paid in an amount equal to 5 per cent of petitioner's receipts for carrying said mails (R. 1-5). Respondent demurred to petitioner's third amended complaint (R. 5), which demurrer was sustained without leave to amend. Thereupon judgment was rendered for your respondent herein (R. 5), from which judgment your petitioner appealed to the Supreme Court of the State of California (R. 6), and the Supreme Court of the State of California affirmed the judgment of the said Superior Court (R. 7-11) and thereafter denied petitioner's application for rehearing (R. 11). From the judgment of said Supreme Court your petitioner seeks this writ of certiorari.

II.

Reasons Relied on for the Allowance of the Writ.

A.

THE TAX IN QUESTION IS A DIRECT TAX UPON A FEDERAL MAIL CONTRACT AND IS A TAX UPON THE MEANS EMPLOYED BY THE FEDERAL GOVERNMENT TO EXERCISE ITS CONSTITUTIONAL POWERS.

B.

THE TAX AS LEVIED IS ARBITRARY, CONFISCATORY AND CONSTITUTES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

1. THE GROSS-RECEIPTS TAX ON HIGHWAY TRANSPORTATION COMPANIES IS ESSENTIALLY A TAX UPON OPERATIVE PROPERTY AND IS NOT A TAX ON GROSS RECEIPTS OR INCOME OF SUCH PROPERTY.

2. THE GROSS-RECEIPTS TAX IS INTENDED TO BE APPROXIMATELY THE EQUIVALENT OF AN AD VALOREM TAX ON THE PROPERTY AT A GIVEN RATE. IT WAS FIXED SO AS TO MAKE THE TAX THE EQUIVALENT AS A FAIR TAX VALUE ON ALL OPERATIVE PROPERTY IN USE AT ITS VALUE.

3. A PLAN OF TAXATION THAT IS ARBITRARY AND THE VALUATION GROSSLY EXCESSIVE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

C.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT ON QUESTIONS OF FEDERAL LAW.

Your petitioner has furnished a certified copy of the complete transcript of the record in said cause, including the proceedings in the Supreme Court of the State of California.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of this Honor-

able Court, directed to the Supreme Court of the State of California, commanding said court to certify and send to this Court for its review and determination, at a date to be therein designated, a complete transcript of all of the proceedings in said Supreme Court of the State of California in the cause entitled, "Leslie T. Alward, appellant, *vs.* Charles G. Johnson, Treasurer of the State of California, appellee, Sacramento, No. 4261, in the records of said Supreme Court, and that judgment and decree of said Supreme Court in said cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may seem meet and the nature of the case require.

And so your petitioner will ever pray.

Dated San Francisco, California, January 16, 1930.

LESLIE T. ALWARD,
Petitioner,

By BURKE CORBET,
SIMEON E. SHEFFEY,
Solicitors for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 628

LESLIE T. ALWARD, PETITIONER,

vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I.

Opinion of the Court Below.

Opinion of the California Supreme Court rendered October 7th, 1929 (R. 7-11): *Alward v. Johnson*, 78 Cal. Decisions, page 471.

II.

Jurisdiction.

The statutory provision believed to sustain jurisdiction is Section 237, Judicial Code, as amended Feb. 13, 1925, 43 Stat. L. 937.

III.

Statement of the Case.

Such statement is set forth in the petition (pp. 1 and 2) and is, therefore, not here repeated.

IV.

ARGUMENT.

A.

The tax in question is a direct tax upon a Federal mail contract and is a tax upon the means employed by the Federal Government to exercise its constitutional powers.

A State tax upon the *property* of one under contractual obligation to render service to the Federal Government to aid it in carrying out its governmental functions is not prohibited by constitutional limitations where it leaves such person free to discharge the duties undertaken. The Supreme Court of the United States so held in *Railroad Company v. Peniston*, 85 U. S., 5.

But the court there pointed out the following important distinction, at pages 35-37:

> "Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government. * * * In *McCulloch v. Maryland*, a difference was pointed out between a tax upon its *property* and one upon its *action*. In noticing an alleged resemblance between the bank and a government contractor, Chief Justice Marshall said: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.' This distinction, so clearly drawn in the earlier decisions, between a tax on the *property* of a governmental agent, and a tax upon the *action* of such agent, or upon his right to be, has ever since been recognized. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose. * * *
>
> It is, therefore, manifest that exemption of Federal agencies from State taxation is depend-

ent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their *property* has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their *operations* is a direct obstruction to the exercise of Federal powers.

In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson v. Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character."

Mr. Justice Bradley, with whom concurred Mr. Justice Field, dissenting, stated, at pages 41-42:

"The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government

has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the *contract* is the means employed for carrying into execution the powers of the government, and the *contract* alone, and not the contractor, is *exempt* from taxation or other interference by the State government.

But where the General government creates a corporation as a means of carrying out a national object, that corporation and its powers, property, and faculties, employed in accomplishing the service, are the instrumentalities by which the government effects its objects."

In *Western Union Telegraph Company v. The City of Richmond*, 26 Grat. 1, at 34, the same distinction is stated:

"The cases do recognize a distinction between taxation of the property belonging to a private corporation employed by the general government and taxation of the instrumentalities or means of the government in the possession of such corporation. The state may tax a banking institution, but it cannot tax the currency or the government bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though *not the contract.*"

So, in *Panhandle Oil Company v. Mississippi*, 277 U. S., 218, the Supreme Court of the United States held that a *sales* tax upon gasoline sales to the Federal Government by a private corporation, whose only relation to the government was that of contract, was invalid, the tax being upon the sale "before the gasoline has left the dealer's hands," *id est*, upon its activities under the Government contract. The same court recently followed this decision in the case of *Graysburg Oil Company v. Texas*, 278 U. S., 582, which involved an occupation tax based on sales, by reversing the decision of the Texas Commission of Appeals, reported in 3 S. W. (2d), 427.

In *Telegraph Company v. Texas*, 105 U. S., 460, a telegraph company sued to recover a State tax of one per cent for every message sent, without deduction for messages sent by government officers on government business. The Supreme Court of the United States stated, on page 466:

> "As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. * * *
>
> It follows that the judgment, so far as it includes the tax on messages sent * * * for the government on public business, is erroneous."

San Francisco v. Western Union Telegraph Company, 96 Cal, 140 at 148, is in accord.

So also, in *Louvein v. Moody*, 12 S. W. (2d) 989, reversing the same case at 300 S. W. 957, the Texas

Commission of Appeals held that a private person owning trucks and operating them exclusively in the transportation of mail under Federal contract was entitled to exemption of such vehicles from State registration, the Commission stating, at pages 989-990:

> "Of tolls required for passage of privately owned vehicles laden with mail being transported under contract, Chief Justice Taney (in Searight v. Stokes, 3 How. 151, 168, 11 L. Ed. 537) had this to say: 'Nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Post Office Department. It is not a contingent expense, which may or may not be incurred, and about which a contractor may speculate; but a certain and fixed amount, for which he must provide, and which, therefore, in his bid for the contract, he must add to the sum he would be otherwise willing to take.' * * *
>
> If the Texas statute be applicable to Louwein in regard to his mail trucks, it makes penal use of those trucks in carrying the mail unless he first pay the 'fee' or 'tax'. *Use of the trucks upon highways, and not ownership*, is the subject-matter burdened. The cases cited, in our opinion, settle the matter of 'practical effect' as increasing the cost to the United States of execution of its power and duty (section 8, cl. 7, artl. 1) to establish and operate post offices, etc., and that, too, in a way sufficiently direct as to be an interference with the free execution of that power."

This Court has relied most strongly on *Metcalf and Eddy v. Mitchell*, 269 U. S., 514. With the greatest

respect for this Court, we do not believe that case and *Kreipke v. Commissioner of Internal Revenue*, 32 Fed. (2d) 594, are in conflict with the *Panhandle Oil Company* case and the other cases *supra*. These decisions involve taxes upon income, salary, or other receipts by government contractual agents and do not involve taxes on Federal contracts or sales or other operations thereunder. Since the tax involved in this case is on "property-used exclusively in the operation of their business in this State" as distinguished from a tax on income or receipts from such business—we submit that such cases have no bearing upon the present appeal.

However, the rule of the *Metcalf and Eddy* case, *supra*, is stated by the court subject to the following qualifications, pages 525-6:

> "Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the functions of government and thus be held to be void. See *Railroad v. Peniston, supra*, page 36; *Farmers Bank v. Minnesota, supra*, p. 522; *Choctaw & Gulf Railway Co. v. Harrison, supra*, p. 272.
>
> But we do decide that one who is not an officer or employee of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state."

Compare with the above case *People of the State of New York v. Jacob A. Cantor*, 236 N. Y., 417, holding illegal the inclusion in taxable assets assessed to an

individual of unpaid money due him upon a war contract with the Federal Government, the court stating:

> "If we should assume that a state, carried away by some species of popular passion, or some fatuous theory of Federal and state relations, could enact a law providing that the amount coming due to one of its citizens from the Federal government under such a contract as this should be taxed at 50 per cent of its amount, we think no one could doubt that the Federal government would be hindered or embarrassed by such action in making contracts to enable it to carry on war. It either would not be able to get persons to take such contracts, or it would be compelled to add to the amount of compensation to be paid to them the extra amount which the state proposed to take by way of taxation. Either result would be a handicap and a source of hindrance, and, in our judgment, would clearly come within the abiding principles laid down in M'Culloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed., 579, and the Banks *v.* New York (New York *ex. rel.* Bank of New York Nat. Bkg. Asso. *v.* Connelly) 7 Wall. 16, 19 L. Ed., 57. The fact that the tax might be 2 per cent instead of 50 per cent would alter the amount of embarrassment, but not the principle involved.
>
> There is called to our attention by respondents the case of Hibernia Sav. & L. Soc. *v.* San Francisco, 200 U. S., 310, 50 L. ed., 495, 26 Sup. Ct. Rep., 265, 4 Ann. Cas., 934, which holds that the rule that states cannot tax official agencies of the Federal government does not apply to obligations such as checks and warrants avail-

> able for immediate use. That case does not, in our opinion, modify the principles which we think must be applied to the present one. Of course, a time must be reached when the proceeds of such a contract as this would lose their character as connected with and incidental to a Federal contract, and become the ordinary personal property of the person who has received them."

This precise point was decided in favor of petitioner's contention in *Commonwealth of Pennsylvania v. Lehigh Valley Railroad Company*, 4 Dauphin County Reports, 174, 176, where it was held that gross receipts from the transportation of United States mail had to be excluded from the computation of the gross-receipts tax assessed against a railroad.

The California Legislature, itself, in the most unqualified terms, has expressed the fact that it does not intend to tax gross receipts of this kind, by passing a statute exempting such receipts (Political Code, Section 3664*aa*, as amended by Chapter 780 of the Statutes of 1929.)

On all established theories of taxation it is clear that in this case it should be determined that the attempt to tax petitioner's mail contract as such is invalid and likewise that if the State laws are to be construed as attempting such a tax not directly upon the mail contract, but indirectly in the guise of an additional tax burden on the physical property itself, then that attempt also must fail.

Apart from all theory, it is patent enough that, whether in the guise of a tax on his contract or in the

guise of a tax on his physical property, petitioner has to pay to the State 5 per cent of the amounts the government pays him under his mail contract. The result in the end will be that he will have to charge the government an additional 5 per cent the next time he bids on his mail contract. The imposition of a charge of this kind by the State, computed directly upon the amount of compensation received from the United States, can have only one result, an increase in the amount of compensation the United States has to pay. In the end the United States will be paying taxes to the state.

B.

The tax as levied is arbitrary, confiscatory, and constitutes the taking of property without due process of law.

1. THE GROSS RECEIPTS TAX ON HIGHWAY TRANSPORTATION COMPANIES IS ESSENTIALLY A TAX UPON OPERATIVE PROPERTY AND IS NOT A TAX ON GROSS RECEIPTS OR INCOME OF SUCH PROPERTY.

The tax is clearly a property tax upon all operative property used in producing the gross receipts on which the tax is based.

Section 15 of Article XIII of the Constitution provides:

> "(*a*) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons,

baggage and express where the same is transported on the same automobile, jitney bus, state or auto stage transporting said persons shall annually pay to the State a tax upon their franchises, cars, equipment, and other property, or any part thereof, *used exclusively in the operation of their business in that State*, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this State.

All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the State a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, *used exclusively in the operation of their business in this State*, equal to five per cent of the gross receipts from operations of such companies, and each thereof within this State. * * *

Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, *upon the property above enumerated* of such companies."

The court has clearly recognized this in its opinion in this case, saying:

"The question as to whether or not the taxes levied for state purposes by section 14 of article XIII, upon the gross receipts of the utilities there enumerated, are taxes upon property has several times been considered by this court, and in each instance it has been declared to be essentially a property tax. (*Pullman v. Richardson*, 185 Cal., 484, 487, 197 Pac., 346, affirmed in

261 U. S., 330, 339, and cases there cited.) The tax required by section 15 of article XIII of the Constitution on the gross receipts of appellant's business is the identical kind of a tax required by section 14, and is, like the other, esssentially, a property tax."

2. THE GROSS RECEIPTS TAX IS INTENDED TO BE APPROXIMATELY THE EQUIVALENT OF AN AD VALOREM TAX ON THE PROPERTY AT A GIVEN RATE. IT WAS FIXED SO AS TO MAKE THE TAX THE EQUIVALENT AS A FAIR TAX VALUE ON ALL OPERATIVE PROPERTY IN USE AT ITS VALUE.

The value of property ultimately depends on its net earnings (*Pullman Co. v. Richardson*, 185 Cal. 484, 496). Capitalizing the net earnings of property at an interest rate equivalent to a fair return to investors in securities of the operating corporation gives the value of the property. Since the proportion between gross earnings and net earnings of the various classes of public-service corporations can be ascertained, the value of the property to be taxed by the gross-receipts method has an ascertainable relation to gross earnings and can be approximately valued from its gross earnings. By fixing the gross-receipts tax at a rate sufficient to yield a fair tax on the value so computed, the gross-receipts tax would be made equal" to the burdens on property taxed on the *ad valorem* plan.

The Commission explained its method for ascertaining what tax rate on gross earnings is approximately the equivalent of a given rate of taxation of property for purposes of the tax imposed by Section 14 of Article

XIII of the Constitution (which is the identical kind of tax required by Section 15), as follows:

> "Briefly stated, that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property. *This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion.* But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions." (Report of Commission on Revenue and Taxation, 1906, pp. 94-95.)

The foregoing method was summarized in the special report of the State Board of Equalization for the year 1912 as follows (pp. 7-8):

> "In substance, that method was to ascertain for each of the different classes of corporations the normal or typical ratio of net earnings to gross earnings, and then to capitalize the earnings so ascertained at a rate of interest assumed to constitute a fair return to the investors in the securities of such classes of corporations. A theoretical value for the property and franchises in use having been ascertained in this manner, it was then assumed (as the data then

> available seemed to indicate to be the case) that the average burden of taxation throughout the state was one per cent of the true value of the taxed property, and one per cent of this theoretical valuation of the typical corporation's property of each class having been computed, the next step was to ascertain what rate applied to the gross earnings of such companies would yield an amount equal to that one per cent of the valuation. These theoretical rates, having been ascertained on the basis of a study of the typical or normal company, were then tested by ascertaining their probable effect upon California companies of each of the different classes."

The Commission on Revenue and Taxation thus regarded gross receipts as merely the measure of tax to be paid by public-service corporations; the tax itself, in its essential nature, was to be a *fair tax on property valued by net earnings.*

In *Edward W. Hopkins v. Southern California Telephone Co. and The Pacific Telephone and Telegraph Company,* 275 U. S. 393, at 401, the United States Supreme Court stated:

> "Sec. 14, Article XIII (adopted 1910), was proposed by a Commission which gave the matter much consideration and made an elaborate report. It is a result of an earnest effort to provide for enforcement of adequate contributions from public service and some other corporations while avoiding double and unjust taxation. Payment of specified percentages (subject to change by the Legislature) of gross re-

ceipts was directed upon the theory that the value of operative property could be fairly measured by considering receipts therefrom. Also, that by paying to the State a portion of these, the corporation would, in effect, contribute for its operative property the substantial equivalent of all taxes laid upon other property. The Commission (Rep. 1910, p. 19) said: 'In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission.'

The Supreme Court of the State has declared the gross receipts tax is essentially one on property, *Pullman Company v. Richardson*, 185 Cal., 484, 487; and it apparently approves the view that 'a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied.' (*Pacific Gas & Electric Co. v. Levee District No.* 1, 172 Cal., 345; *Great Western Power Co. v. City of Oakland*, 189 Cal., 649. * * *

We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. *Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise.*"

3. A PLAN OF TAXATION THAT IS ARBITRARY AND THE VALUATION GROSSLY EXCESSIVE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The gross-receipts tax being a property tax must rest on all property which contributes to gross receipts. The property which contributed to the gross receipts on which petitioner's tax was based was its physical property and a Federal mail contract. *Ergo*, part of the tax must have been upon the mail contract.

The same conclusion is enforced by a slight consideration of the figures involved here. The complaint alleges that the only things used in earning these gross receipts are certain physical properties and the mail contract; that the physical properties have an actual market value not in excess of $15,000 (Paragraph V, R., page 3), and that their replacement cost would not exceed that sum (Paragraph VII, R., page 4). As the case is before this Court on demurrer, these allegations stand admitted. The tax on petitioner's receipts should be:

Passenger income	$374 14
Freight income	490 32
Total	$862 46

or at the rate of over 5¾ per cent upon the full value of the physical properties.

As we have said, the intent in levying the gross-receipts tax was to tax the operative property at ap-

proximately the same rate that non-operative or common property would be taxed. Thus, the Tax Commission at great length determined what was the real tax burden borne by common property in the different counties of California and showed that in the various counties it ran from 77 cents per hundred dollars in Madera County to $2.67 per hundred dollars in Sutter County (Table 11-16, Final Report of the California Tax Commission, March 5, 1929, page 167). The average rate computed on various hypotheses ran from $1.42 to $1.79 (Table 11-30, page 182), or from $1.42 to $1.81 (Table 1-14, page 62). Similar computations were made for the corporations taxed in accordance with their gross receipts, and it was found that the tax burden varied from $.493 to $2.289, depending upon what theory was taken (Table 11-31, page 185). The report contains detailed computations on various theories showing the application to individual companies and classes of companies of this method of analysis.

From this report it is apparent that only in the exceptional case do these gross receipt taxes even approach the tax rate which would be imposed upon the petitioner here, even though the receipts from the mail contract were excluded from the computation of this tax. With the mail receipts included we find the total tax $2,878.78, or at the rate of $19.19 per hundred dollars on the value of the physical properties. Obviously, no legislation was intended to tax petitioner's physical properties at the rate of $19.19 per hundred dollars. It was only because the taxing authorities insisted upon including in their computation of the tax

not only the gross receipts from the operation of the physical properties, but also the gross receipts from the mail contract, that this astounding result was reached.

The California authorities recognize that under the decision of *Pullman Co. v. Richardson, supra,* it is the duty of the State, where a taxpayer operates both interstate and intrastate business, to determine whether or not the tax ostensibly levied upon its property in California is really a tax upon interstate commerce, and in making that determination to consider whether "the burden upon the property of interstate commerce carriers is out of all reasonable proportion to that imposed upon the property of others within the State" (*Pullman Company v. Richardson,* 185 Cal. 484 at 509). The California Supreme Court apparently overlooked that we have precisely the same kind of situation here. The non-taxable element in this case is not interstate commerce as in the *Pullman* case, but the mail contract, and in determining whether or not a tax is assessed upon the mail contract, it is necessary to consider whether the tax imposed upon the taxable physical property of the taxpayer which is used in connection with the non-taxable property of the contract is "out of all proportion to that imposed upon the property of others within this State."

We submit that the figures shown above demonstrate conclusively that if the receipts of the mail contract are included in the computation of the tax, then the tax, if regarded as a tax solely upon the physical property, is out of all proportion to the tax imposed

upon the property of others within the State. It cannot reasonably be contended that a tax of $19.19 per hundred dollars of the full value of the property is really a tax upon the physical property itself. Obviously, as construed by the State taxing authorities, this tax law in the guise of a tax upon the taxable physical property really imposes a tax upon the nontaxable contract.

In *Union Tankline Co. v. Wright*, 249 U. S. 275, at page 282, this Court says:

> "But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 117; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 26; Adams Express Co. *v.* Ohio, 165 U. S. 194, *s. c.*, 166 U. S. 185; American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70; Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149; Fargo *v.* Hart, 193 U. S. 490; Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450, 453."

Your petitioner in his complaint, Paragraphs III, V, VI and VII (R. 2-4), sets forth facts showing the valuation of the property used in carrying United States mails and parcels post, the rate of taxation on other property not so used and the consequent valuation that would have to be put upon your petitioner's property in order to make it produce the tax assessed against it at the rate at which other property not used as your petitioner's property is used. The facts as al-

leged in your petitioner's complaint upon demurrer stand admitted.

By the provisions of Section 15 of Article XIII of the Constitution of the State of California, this tax should be levied against *common carriers only.* Your petitioner herein contends that as a mail carrier or contractor he is not a *common carrier;* that to classify him as such arbitrarily constitutes the taking of his property without due process of law.

Petitioner desires to call attention to the provisions of Section 15, Art. XIII, of the Constitution of the State of California in this regard, which reads as follows:

> "Taxes levied, assessed and collected as hereinafter provided on companies owning, operating or managing any automobile truck or auto truck, jitney bus or auto stage used in the business of transportation of persons or property *as a common carrier,* for compensation, etc."

This section, by its express terms, applies only to common carriers. Petitioner contends that a mail carrier or contractor is not, within the law, a common carrier. Common carriers generally are defined in 10 *C. J.* 39, as follows:

> "A common carrier has been defined as 'one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.' This definition applies to common carriers by land and by water, without regard to distance or motive power."

In *Frost v. R. R. Comm.*, 197 Cal. 230, at p. 235, the court says:

> "A carrier who files with the Railroad Commission a schedule of his routes, tariffs, and charges, who is under compulsion to render transportation service of the kind, character, and quality prescribed by the Commission, who is disabled to enter into a contract for the rendition of transportation service of any kind, quality or character different from that prescribed, or for a rate of compensation either greater or less than the prescribed rate, is at least subjected to the disabilities and limitations which circumscribe a public or common carrier (10 *C. J.* 37 *et seq.*). It is conceded that the state has no power by mere legislative fiat, or even by constitutional enactment, to transmute a private utility into a public utility, or a private carrier into a public carrier."

The foregoing case was reversed by the Superior Court of the United States in *Frost v. R. R. Comm.*, 271 U. S. 583. On page 590, the court says:

> "Plaintiffs in error were engaged under a single private contract in transporting, for stipulated compensation, citrus fruit over the public highways between fixed termini. They were brought before the commission charged with violating the act, for the reason that they had not secured from the commission a certificate of public conveyance and necessity. The commission, while agreeing that plaintiffs in error were, in fact, private carriers, held that they were subject to the provisions of the act

and directed them to suspend their operations under their contract unless and until they should secure a certificate that public convenience and necessity required the resumption or continuance thereof. The commission's order was upheld by the State supreme court, 70 Cal. Dec., 457.

"On behalf of plaintiffs in error the contention is that, in its application to private carriers, the act has the effect of transforming them into public carriers by legislative fiat. Upon the other side it is said that the sole purpose of the legislation 'is to impress upon such private carriers certain regulations so long as they desire to use the publicly built and owned highways as the chief situs of their business of hauling goods for compensation' and that 'they are not, and cannot be, forced, directly or indirectly, to become common carriers.'

"It is unnecessary to inquire which view is correct, since the act has been authoritatively construed by the state supreme court. That court, while saying that the state was without the power, by mere legislative fiat or even by constitutional enactment, to transmute a private carrier into a public carrier, declared that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon; and that, therefore, the legislature might grant the right on such conditions as it saw fit to impose. In the light of this general statement of principle, it was held that the effect of the transportation act is to offer a special privilege of using the public highways to the private carrier for compensa-

> tion upon condition that he shall dedicate his property to the quasi-public use of public transportation; that the private carrier is not obliged to submit himself to the condition, but, if he does not, he is not entitled to the privilege of using the highways."

In the present case the petitioner is engaged under a contract with the Post Office Department of the United States Government in carrying United States mails. That such a carrier is not a common carrier, see 10 *C. J.* 52, where it is said:

> "Postmasters are not common carriers and there is no analogy between them. Likewise a carrier of the mails is not liable, as a common carrier, to the sender of a letter."

In 2 *Camp. Comm.* (12th ed.), at page 610, it is said:

> "The post office establishment is a branch of the public police and created by statute and the government for management and control of the whole concern. The postmasters enter into no contract with individuals and receive no hire by common carrier, in proportion of the risk and value of loss in their charge, but only a general compensation from the government."

See in accord:

U. S.: *Dunlop v. Munroe*, 7 *Cranch* 242, 3 L. Ed. 329;

Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed. 434, 54 C. C. A. 608; 65 L. R. A. 397 (Aff. 113 Fed. 414);

Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796;
Foster v. Metts, 55 Miss. 77, 30 Am. R. 504;
Powell v. Mills, 30 Miss. 231, 64 Am. D., 158;
Hutchins v. Brackett, 22 N. H. 252, 53 Am. D., 248;
Wiggins v. Hathaway, 60 Barb. 632;
Conwell v. Voorhees, 13 Oh. 523, 42 Am. D., 206;
Schroyer v. Lynch, 8 Watts 453;
Bolan v. Williamson, 2 S. C. L. 551.

"Between a contractor for carrying the public mails, and the sender of letters, there is no privity of contract, and the contractor has no right to, and receives no remuneration from the sender. The Government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the Government, and by it his compensation is paid. He owes a duty, not to the sender of letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire." *Central R. Co. v. Lampley,* 76 Ala. 357, 364, Am. R. 334.

Conclusion.

It is respectfully submitted in the light of the foregoing authorities cited that this case is one in which a review by this Court is proper.

Dated San Francisco, California, January 16, 1930.

SIMEON E. SHEFFEY,
BURKE CORBET
Solicitors for Petitioner.

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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. [redacted] 41

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

BURKE CORBET,
Crocker First National Bank Building, San Francisco, California,
SIMEON E. SHEFFEY,
Hunter-Dulin Building, San Francisco, California,
Solicitors for Petitioner.

Subject Index

I.

Page

Supplemental statement of facts 1

II.

Argument 3

A. Method of taxation involved 3

B. The method of taxation herein involved as applied to this petitioner results in a grossly excessive valuation of his operating profits 5

C. The tax as assessed against this petitioner by the California State Board of Equalization was arbitrarily made, is confiscatory and constitutes the taking of property without due process of law 9

D. Section 15, of Article XIII of the California Constitution applies by its express terms to common carriers only 10

E. The method of taxation so involved was adopted in order that the intangible value of a line or system might be included in the valuation thereof 12

F. The tax in question herein is a tax upon an agency employed by the Federal Government in the exercise of its constitutional powers 14

Conclusion 24

Table of Authorities Cited

	Pages
Contra Costa Water Co. v. Oakland, 159 Cal. 323	13
Corpus Juris, Vol. 28, page 729	12
Lake Tahoe Railroad Co. v. Roberts, 168 Cal. 551	10
McAllen Company v. Massachusetts, 279 U. S. 620	18
McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316	15
New Jersey Bell Telephone Co. v. State Board, etc., 280 U. S. 338	22
Panhandle Oil Co. v. Mississippi, 277 U. S. 218	21
Pullman Co. v. Richardson, 185 Cal. 484	3, 5, 9
Pullman Co. v. Richardson, 261 U. S. 330	3, 6, 7
San Francisco v. Pacific Telephone & Telegraph Co., 164 Cal. 244	3
Union Tank Line Co. v. Wright, 249 U. S. 275	5
Wilcox v. Consolidated Gas Co., 212 U. S. 19	13

Statutes Cited

	Pages
Statutes of California, 1927 Ch. 19, Sec. 1	1
Political Code of California, Secs. 3664aa, et seq.	1
Constitution of California, Sec. 14, Art. XIII	9, 11
Constitution of California, Sec. 15, Art. XIII	1, 11
U. S. Code Annotated, Title 39, Secs. 421, et seq.	13

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 628

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

I.

SUPPLEMENTAL STATEMENT OF FACTS.

In this petitioner's petition for Writ of Certiorari, petitioner gave a summary and short statement of the facts involved in the case. In addition thereto, petitioner wishes to add that pursuant to the constitutional amendment Section 15, Article XIII, of the Constitution of the State of California, and the enactments of the Political Code of the State of Cali-

fornia in accordance therewith, being Chapter 19, Section 1, Statutes of California, 1927, and also being Sections 3664aa et seq. of the Political Code of the State of California, the said Board of Equalization of said State required petitioner to file with it a statement of his gross receipts from the operation of his stage line during the year 1926. Upon the basis of this statement for the year 1927, the Board assessed against this petitioner the taxes in question, which petitioner paid under protest. The receipts of this petitioner from the operation of his stage line for the year 1926 are as follows:

Gross receipts from carrying passengers	$ 8,893.31
Gross receipts from carrying freight	9,806.43
Gross receipts from carrying U. S. mail and parcel post	42,286.75
Total gross receipts for the year 1926	$60,986.49

Upon the basis of these receipts the State Board of Equalization of the State of California assessed taxes against this petitioner in the total amount of $2,978.78. On the basis of the calculation of this tax of the latter sum, $2,114.32 is based upon the receipts of this petitioner from carrying United States mail and parcel post.

After payment of this tax under protest, this petitioner sued in the Superior Court of the State of California, in and for the County of Sacramento, for a return of that portion of the tax derived from the percentage of receipts from carrying mail and parcel post. After demurrer sustained without leave to amend, judgment was taken in said Superior Court

against this petitioner. This petitioner thereupon appealed to the Supreme Court of the State of California, in which latter Court judgment of the said Superior Court was affirmed. From the judgment of the Supreme Court of the State of California this petitioner thereupon petitioned this Court for a Writ of Certiorari to the Supreme Court of the State of California, which petition was by this Court granted.

II.

ARGUMENT.

A.

METHOD OF TAXATION INVOLVED.

The method of evaluating property for tax purposes upon the basis of gross receipts was first adopted by the State of California with the enactment of Section 14 to Article XIII of the Constitution of the State of California, enacted in November, 1910.

San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244;

Pullman Company v. Richardson, 185 Cal. 484.

Various reports of commissions relating to this method of taxation were cited and discussed beginning on page 19 and ending on page 22 of petitioner's brief in support of his petition for Writ of Certiorari on file herein. This method is also discussed by this Court in *Pullman Company v. Richardson*, 261 U. S. 330.

From these reports and authorities the purpose of the adoption of this method of taxation was to arrive

at an actual valuation of a going concern, like a public utility, that would include therein the intangible value of the system or operating property constituting its good will. In other words, the valuation of the physical properties of a system like a railroad company or a telegraph company would not reach the intangible or good will value of such business.

The gross receipts method of valuation, however, was a yardstick by which these intangible values would be reached, and the percentages adopted in the constitutional amendments or later adopted by the legislature of the State of California would be a basis upon which a fair valuation of such system would be determined.

The petitioner in this case is not objecting to the method of taxation but rather to the manner in which it is applied to this petitioner. This petitioner contends that as this method is being applied to him by the said Board of Equalization, it

(1) *results in a grossly excessive valuation of his operating properties;*

(2) *that as applied, it is arbitrary, confiscatory and constitutes the taking of his property without due process of law;*

(3) *that the constitutional amendment itself by its express terms, applies only to common carriers, and that this petitioner in carrying United States mail is not a common carrier,* and

(4) *that it is a tax upon an agency of the federal government.*

B.

THE METHOD OF TAXATION HEREIN INVOLVED AS APPLIED TO THIS PETITIONER RESULTS IN A GROSSLY EXCESSIVE VALUATION OF HIS OPERATING PROPERTIES.

As indicated by the foregoing discussion and authorities the method of taxation involved in this matter was adopted to arrive at the real value of the property. Section 1 of the Constitution of the State of California provides:

> "All property in the State, except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law as hereinafter provided."

In *Pullman Company v. Richardson*, 185 Cal. 484, at page 491 the California Supreme Court says:

> "The question as to whether or not a particular taxing law violates the Federal Constitution depends upon the practical operation and the effect of the tax imposed, and not upon the definitions or declarations of State authorities. The rule is thus stated in the recent case of *Shaffer v. Carter*, 252 U. S. 37 (64 L. Ed. 445, 40 Sup. Ct. Rep. 221): 'For where the question is whether a state taxing law contravenes rights secured by that instrument the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.'" (Citing authorities.)

In *Union Tank Line Company v. Wright*, 249 U. S. 275, at page 282, the Court says:

> "A state may not tax property belonging to a foreign corporation which has never come within

its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. Insofar, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the State to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct. For example, the mileage basis in case of a telegraph company (Western Union v. Massachusetts) and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall). *But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause of the Fourteenth Amendment or both.*"

When the method of taxation herein involved was before this Court in the case of *Pullman Co. v. Richardson*, 261 U. S. 330, this Court said at page 339:

"The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all

other taxes on such property. The Supreme Court of the State holds it a tax on the property specified. In no material way does it differ from the tax which was recognized by this Court as a proper tax in U. S. Express Co. v. Minnesota and Cudahy Packing Co. v. Minnesota above cited. True, it is computed with special regard to gross receipts, but this as is fairly shown is done merely as a means of getting at the value of the property considering its nature and use. *The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property value as part of a going concern, nor to be relatively higher than the taxes on other kinds of property.*"

In the present case this petitioner in his complaint alleged that the tax was grossly excessive and placed an unreasonable valuation upon plaintiff's property. In Paragraph V of petitioner's complaint (transcript of record, page 2), this petitioner set forth an itemized list of his property and its actual market value. In Paragraph VII of said complaint (transcript of record, page 3) this petitioner alleged that the State Board of Equalization had made the assessment in an arbitrary and excessive manner and that the valuation thereon calculated upon a gross receipt basis results in the valuation of this petitioner's property far in excess of its actual worth.

Respondent's demurrer admitted all these facts. Consequently, this petitioner's case herein involved is distinguishable from the case of *Pullman Company v. Richardson, supra*, wherein this Court says at page 339.

> "The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern nor to be relatively higher than the taxes on other kinds of property."

This petitioner has contended at every stage of the proceedings that this tax is far in excess of what would be legitimate as an ordinary tax on his property valued as a going concern, and that it is grossly higher than the taxes on other kinds of property; that it in no way attempts to reach the real value of this petitioner's property.

This petitioner in said complaint, Paragraph VII thereof, alleges that under the *ad valorem* method of valuing property for taxes, this petitioner never paid in excess of $350.00 per annum as a tax on said property. Therefore, if this petitioner's property has any value as a going concern, such value is represented only in its ability to earn income from carrying *passengers* and *freight*. On this basis, to-wit, receipts from carrying passengers and freight, and the basis of the assessment made against this petitioner by the State Board of Equalization for 1927, the tax on petitioner's property would be $861.56 after excluding therefrom the tax derived by including the gross income from carrying United States mail. In other words, after the adoption of the gross receipts method of evaluating petitioner's property the amount of tax assessed against this petitioner would be more than double the amount of tax assessed under the *ad valorem* method of valuing property after excluding the receipts from carrying United States mail.

C.

THE TAX AS ASSESSED AGAINST THIS PETITIONER BY THE CALIFORNIA STATE BOARD OF EQUALIZATION WAS ARBITRARILY MADE, IS CONFISCATORY AND CONSTITUTES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Prior to the adoption of the gross receipts method of evaluating property in Section 14 of Article XIII of the Constitution of California, hearings were held by commissions appointed for the purpose of determining the operation of the method of taxation. In *Pullman Company v. Richardson*, 185 Cal. 484, at page 504, the California Supreme Court says:

> "Before the new scheme was recommended hearings were had before this Commission and all transportation companies, including plaintiff, doing business in this State were given an opportunity to present their views and their data upon the subject."

This petitioner in his complaint, Paragraph VII thereof (beginning on page 3, transcript of record), alleges that the State Board of Equalization in fixing the valuation on this petitioner's property considered no other element of value with reference thereto, except its gross earnings. This allegation of fact is admitted by the demurrer. In other words, no hearings were had, no opportunity was given to this petitioner, and other persons similarly situated to present their views and data upon this subject to determine whether or not the tax in its application would result in a fair valuation of the property involved. This petitioner therefore, contends that the method as applied by the State Board of Equalization was arbitrary and re-

sulted in a grossly excessive valuation of this petitioner's property. This petitioner's further views, contentions and authorities are set forth beginning on page 23 of his brief in support of his petition for Writ of Certiorari. Therefore, the making of this arbitrary assessment constitutes a taking of this petitioner's property without due process of law.

D.

SECTION 15 OF ARTICLE XIII OF THE CALIFORNIA CONSTITUTION APPLIES BY ITS EXPRESS TERMS TO COMMON CARRIERS ONLY.

This petitioner contends that since by the language of the section itself it applies only to common carriers, that this petitioner is not subject to the tax so far as carrying United States mail is concerned; that in this capacity he is not a common carrier, and that to classify him as such constitutes a violation of the Fourteenth Amendment of the Federal Constitution.

This petitioner has discussed this point in his brief in support of his petition for Writ of Certiorari, beginning on page 27 thereof.

In addition to the matters set forth in said supporting brief, this petitioner desires to call attention to the case of *Lake Tahoe Railroad Co. v. Roberts*, 168 Cal. 558. In that case it was held by the California Supreme Court that boats operating on Lake Tahoe and owned by Lake Tahoe Railroad Company were not used exclusively in the railline business of that company, and hence were not taxable for state purposes by the gross receipts method under the terms

of Section 14 of Article XIII of the Constitution. The Lake Tahoe Railway Transportation Co., owned and operated a rail line between Truckee, California and Tahoe City, California, and owned and operated boats plying between Tahoe City and various points on Lake Tahoe. The boats carried passengers and freight to and from the trains at the railway depot at Tahoe City, and between points on the lake. Forty-five per cent (45%) of the gross receipts from the operation of the boats was derived from purely lake service. Fifty-five per cent (55%) of the gross receipts from the operation of those boats was derived from rail line business with the boats serving as rail line adjuncts. So distinct were the two operations that in the winter months the rail line business was entirely suspended, but the boats continued to run up and down the lake carrying passengers, mail, freight and express.

In the *Tahoe* case the Court was concerned with the dual use of property, one use being a rail line use, and the Court concluded that under those circumstances the boats being devoted about equally to the two uses, it could not be said that the boats were used exclusively in a rail line business.

The language of Section 15, of Article XIII of the California Constitution, so far as the definition of operative property is concerned, is identical with the language of Section 14 of that article in its definition of operative property. Only that property which is "used exclusively" by an automotive common carrier is subject to the tax provided for in Section 15 of Article XIII. This petitioner in his complaint shows

that 70% of his gross earnings for the year 1926 were derived from the transportation of government mail.

Petitioner, therefore, contends that since he is not a common carrier while carrying United States mail, that to classify him as such by requiring him to report his gross receipts therefrom, and to evaluate his property thereupon, constitutes a taking of his property without due process of law.

E.

THE METHOD OF TAXATION SO INVOLVED WAS ADOPTED IN ORDER THAT THE INTANGIBLE VALUE OF A LINE OR SYSTEM MIGHT BE INCLUDED IN THE VALUATION THEREOF

The intangible value so sought to be included in the valuation of a property is sometimes termed the good will thereof. What is good will? Good will is defined generally in 28 *Corpus Juris* 729 as follows:

> "Good will may be defined to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill, affluence, punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. This comprehensive definition has been cited with approval in numerous cases. An early decision defined it to be nothing more than the probability that the old customers would resort to the old place. But this definition, although

> frequently quoted, has been criticised as too narrow. In its broadest sense good will may be said to be reputation, but generally the definitions given by the courts include as a leading element the probability that the customers of the old establishment will continue their patronage."

In the present case petitioner contends that his property has acquired no good will by reason of his contract for carrying United States mails. This Court may take judicial notice of the fact that mail contracts are awarded by the Post Office Department after competitive bidding; that the successful bidder is required to furnish bonds for faithful performance, and that the contract is personal to him. See *U. S. Code Annotated*, Title 39, Secs. 421 et seq.

People do not send mail and become customers, and continue as such because of any reputation of a particular mail carrier, or because they are accustomed to patronize him. Furthermore, so far as a mail carrier is concerned, he has a monopoly over his line.

In *Contra Costa Water Co. v. Oakland*, 159 Cal. 323, the Court held that a company having a monopoly in its line could not consider good will as part of the value thereof.

To the same effect is *Wilcox v. Consolidated Gas Company*, 212 U. S. 19. At page 52, the Court said:

> "We are also of the opinion that it is not a case for the valuation of 'good will'. The master combined the franchise value with that of good will and estimated the total value at twenty millions. The complainant has a monopoly in fact,

> and the customer must take gas from it or go without. He will resort to the 'old stand' because he cannot get gas anywhere else. The Court below excluded that item and we concur in that action."

Therefore, in the present case, this petitioner has a monopoly on carrying the mails between Redding, California, and Big Bar, California. People send their mails not because they like petitioner but petitioner is the only agent furnished by the Post Office Department of the United States to transport mail between these points.

F.

THE TAX IN QUESTION HEREIN IS A TAX UPON AN AGENCY EMPLOYED BY THE FEDERAL GOVERNMENT IN THE EXERCISE OF ITS CONSTITUTIONAL POWERS.

In petitioner's brief in support of his petition for Writ of Certiorari, we have attempted to show, and believe we have shown, that the property that is being taxed in this case is the property being used by this petitioner in carrying freight, passengers and United States mail, and in addition thereto, the mail contract existing between this petitioner and the United States Government.

The State of California denominates this tax a property tax. If so, it must rest upon all property which contributes to gross receipts. The property which contributed to the gross receipts on which the tax against this petitioner was assessed, was based

upon his physical property and a Federal mail contract, *ergo,* part of the tax must rest upon the mail contract.

The argument and authorities heretofore furnished show that the tax in question is excessive so far as the valuation of the property is concerned. That it was assessed simply by taking the gross receipts of this petitioner for the year 1926. That as a mail carrier this petitioner's business has no good will or intangible value, as any his stage line may have is attributable only to the carrying of freight and passengers. That in carrying mail, this petitioner is not acting as a common carrier and therefore he should be exempted from the tax so far as his carrying mail is concerned, by the express provisions of the act. This being so, the only conclusion that can be reached is that the tax assessed against this petitioner affects the taking of part of his gross receipts from carrying mails by the State of California thereby making the Federal Government contribute to the taxes levied by the State of California.

In going over this ground, we feel that we are covering exactly the same ground that was covered by Mr. Chief Justice Marshall in the case of *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, the principles of which case have been so long recognized and settled, that the citation of further authority than this case itself is simply a work of supererogation. Reverting, however, to the well-established doctrine of this case, this petitioner wishes to call this Court's attention to certain pertinent language contained in the opinion of that case. On page 417, the Court says:

"Take, for example, the power 'to establish post offices and post roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury in such Court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment."

In the same opinion on page 427, the Court says:

"That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled

by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution."

And finally, in this case, at page 431 the Court says:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose

that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

"If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

"If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

In the recent cases of *MacAllen Company v. Massachusetts*, 279 U. S. 620, at page 625 this Court says:

"The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving a tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg, &c. Ry. Co. v. Texas*, 210 U. S. 217, 227. And this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or under the guise of that designation, is in substance and reality a tax on the income derived from tax-exempt securities. If, by varying the form—that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at—the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught. The rule is otherwise. To this effect, the following cases may be cited as illustrative.

"A tax laid in terms on the occupation of an importer is in effect a tax on imports. *Brown v. Maryland*, 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:

"'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode

of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.'

"A tax on the income of an office is a tax on the office itself, and cannot be laid in that form if the office be exempt. *Dobbins v. The Commissioners of Erie County*, 16 Pet. 435.

"A tax on sales made by an auctioneer is a tax on the goods sold, and, where such goods are imported and sold for the importer, the law authorizing the tax is void as imposing a duty on imports. *Cook v. Pennsylvania*, 97 U. S. 566.

"A stamp tax upon a bill of lading is in substance and effect a tax upon the thing transported, because of its necessary association with the shipment. *Almy v. California*, 24 How. 169, 174. And see *Woodruff v. Parham*, 8 Wall. 123, 138."

And further, at page 629, the Court says:

"These constitute special and compelling reasons why courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the

former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting to the well-established rule that '* * * what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result * * * constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.' Fairbank v. United States, 181 U. S. 283, 294, 300."

The foregoing authorities indicate clearly that no matter under what guise the tax may be dressed, it cannot be allowed to have the effect of being a taxation upon a means employed by the Federal Government to affect its constitutional powers.

Again we refer to the case of *Panhandle Oil Company v. Mississippi*, 277 U. S. 218, also cited and referred to in petitioner's brief in support of his petition for writ of certiorari. In this case, the State of Mississippi sued to recover the amount of a state tax on gasoline claimed to be due from the distributor of gasoline sold to the United States Government for the use of its Coast Guard fleet in service in the Gulf of Mexico, and its Veterans Hospital at Gulfport. At page 452, the Court says:

"The United States is empowered by the Constitution to maintain and operate the fleet and

hospital. Article 1, Sec. 8. That authorization and laws enacted pursuant thereto are supreme (article 6); and, in case of conflict they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions."

In the last cited case, the Federal Government was buying gasoline. The State of Mississippi sought to collect a tax on the gasoline sold to the Federal Government. The Court recognized that if such a tax were allowed the ultimate payer of the tax would be the United States Government and it therefore held that such tax would not be allowed.

In the case at bar, this petitioner is selling to the United States Government his services in carrying United States mail. From the price which the United States Government is paying this petitioner for his services, the State of California has exacted a portion of these receipts. There can be no difference in the sale of a commodity involved in the case at bar and in the case of *Panhandle Oil Company v. Mississippi, supra*. If the right to tax in one case is denied, it should be in the other. If the tax in the case at bar is allowed, the cost of carrying United States mail will be increased and the increased cost will be paid by the United States Government.

The recent case of *New Jersey Bell Telephone Co. v. State Board of Tax and Assessment of the State of New Jersey*, 280 U. S. 338, seems to be determinative of the question here involved.

In the last cited case, the State of New Jersey sought to tax the appellant telephone company a franchise tax based upon its gross receipts. At page 346, the Court says:

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co. v. Richardson*, 261 U. S. 330, 338, 67 L. Ed. 682, 686, 43 Sup. Ct. Rep. 366, and cases cited; *Sprout v. South Bend*, 277 U. S. 165, 171, 72 L. Ed. 833, 837, 62 A. L. R. 45, 48 Sup. Ct. Rep. 502. This tax cannot be sustained if it is not upon the property, but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

In the case at bar, if the tax is one upon the gross receipts derived from carrying United States mails, it falls within the inhibitions of the Federal Constitution since the regulation of the mails is vested by this Constitution in the Federal Government exclusively. It is true that in the *New Jersey* case the tax was designated as a franchise tax while in the case at bar the tax is designated as a property tax. However, since the pleadings in this case show that the tax, as assessed, results in an exorbitant tax, when we reach a line where a tax becomes exorbitant, it can no longer be called a property tax but constitutes a direct taking

of the moneys paid by the United States Government for the carrying of mails by the State of California under the guise of a tax.

In the *New Jersey* case, the Court at page 348 continues:

> "Assuming, as appellee contends, that these assessments did not include the value of appellant's right to use streets, it would be without rational basis and arbitrary to use a mileage proportion of gross earnings to measure the value of the privilege or easement in question."

So, in the case at bar, if we assume that in making the assessment involved, the California State Board of Equalization did not include in the property tax the contract for carrying United States mails, the tax is without rational basis and arbitrary in that no effort was made to ascertain the value of petitioner's property other than to take the gross receipts which be derived from all sources in the use of the property in the year 1926.

CONCLUSION

It is therefore respectfully submitted that in the light of the foregoing points and authorities that this case is one in which the decision of the Supreme Court of the State of California should be reversed.

Dated, San Francisco, California,
November 24, 1930.

Respectfully submitted,
BURKE CORBET,
SIMEON E. SUTTON,
Solicitors for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this ..... day of November, 1930.

Attorney General of the State of California,

Deputy Attorney General of the State of California,
Solicitors for Respondent.

FILE COPY

DEC 30

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. [redacted] 41

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

RESPONDENT'S REPLY BRIEF

U. S. WEBB,
Attorney General of the State of California,

H. H. LINNEY,
Deputy Attorney General,
Attorneys for Respondent.

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TOPICAL INDEX

	Page
Statement of the Case	1
The Facts	2
Argument	5
The Tax Is Not Violative of the Fourteenth Amendment	5
Section 15, Article XIII	6
The Tax Is Not on a Federal Agency	22

INDEX OF CASES

	Page
Alward vs. Johnson, 208 Cal. 359	30
Atchison, Topeka and Santa Fe Ry. vs. Collins, 294 Fed. 742	14
Atlantic Coast Line R. Co. vs. Doughton, 43 Sup. Ct. 620, 624	18
Bacon Service Co. vs. Huss, 199 Cal. 21, 275 U. S. 507	16, 18
Bank of California vs. Roberts, 173 Cal. 398	11
Bekins Van Lines vs. Riley, 280 U. S. 80	15, 29
Bells Gap Rd. Co. vs. Pa., 134 U. S. 232	21, 30
Central Pac. Ry. Co. vs. California, 162 U. S. 91	23
Chicago, etc., Co. vs. Babcock, 204 U. S. 585	23
County of San Bernardino vs. State Board, 172 Cal. 76	10
Dane vs. Jackson, 256 U. S. 58, 599	19
Flint vs. Stone Tracy Co., 220 U. S. 107	28
Hartford Fire Ins. Co. vs. Jordan, 168 Cal. 270	11
Henderson Bridge Co. vs. Henderson, 173 U. S. 592	21, 30
Hughes vs. City of Los Angeles, 168 Cal. 764	11
In re Schmolke, 199 Cal. 42, 273 U. S. 646	16, 18
Ky. Railroad Tax Cases, 155 U. S. 321, 337	18
Lake Tahoe Ry. Co. vs. Roberts, 168 Cal. 551	10
Louisville Gas & Electric Co. vs. Coleman, 48 Sup. Ct. 423	18
Macallen Co. vs. Mass., 279 U. S. 620	28
Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283 (293–297)	18
Matter of Schuler, 167 Cal. 282	18
Matter of Stork, 167 Cal. 294	18
McCulloch vs. Maryland, 4 Wheat. 315	20

INDEX OF CASES—Continued.

	Page
Metcalf & Eddy vs. Mitchell, 269 U. S. 514	27
Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322	20, 30
Miller & Lux vs. Richardson, 182 Cal. 115, 128	11, 19, 30
New Jersey Bell Tel. Co. vs. State Board, 280 U. S. 338	28
Northwest Auto Co. vs. Hulbert, 207 Pac. 161	18
Ohio Tax Cases, 203 Fed. 537, 232 U. S. 576	20, 30
Oliver Iron Mining Co. vs. Lord, 43 Sup. Ct. 525, 529	18
Pacific Coast S. S. Co. vs. Richardson, 186 Cal. 70	11
Pacific Express Co. vs. Seibert, 142 U. S. 339, 351	18
Pacific Gas & Electric Co. vs. Roberts, 168 Cal. 420	10
Pacific Gas & Electric Co. vs. Roberts, 176 Cal. 183	10
Panhandle Oil Co. vs. Miss., 48 Sup. Ct. 451, 277 U. S. 218	24, 27
People vs. Alaska Pac. S. S. Co., 182 Cal. 202	11
People vs. Ford Motor Co., 188 Cal. 8	11
Pullman Co. vs. Richardson, 185 Cal. 484, 261 U. S. 330	10
Quaker City Cab Co. vs. Pa., 48 Sup. Ct., 553	18
Raymond vs. Holn, 206 N. W. 166	18
San Francisco vs. Pacific T. & T. Co., 166 Cal. 244	10
San Diego, etc., Ry. Co. vs. State Board, 165 Cal. 560	10
Schwab vs. Richardson, 188 Cal. 27	11
Southern Pac. Co. vs. Collins, 294 Fed. 742	22, 29
Southern Pac. Co. vs. Levee District, 172 Cal. 354	10
Southern Pac. Co. vs. Richardson, 181 Cal. 280	10
State vs. Peterson, 198 N. W. 1011	18
State vs. Pullman Co., 179 N. W. 224	14
State vs. Wells Fargo & Co., 179 N. W. 221	14
State Tax on Foreign Held Bonds, 15 Wall. 300	21
Union Pac. Ry. Co. vs. Peniston, 18 Wall. 5	24
Utah Construction Co. vs. Richardson, 187 Cal. 649	11
Wagner vs. Baltimore, 239 U. S. 207	21
Western Union Tel. Co. vs. Caggart, 163 U. S. 1	23

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1929

No. 628

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

RESPONDENT'S REPLY BRIEF

STATEMENT OF THE CASE

Petitioner, as plaintiff in the trial court, sued the Treasurer of the State of California for the sum of $1,057.16, representing a portion of the first installment of taxes paid under protest for the year 1927, pursuant to section 15, article XIII of the state constitution, and section 3664*aa* of the Political Code, providing for a tax on the gross receipts of highway transportation companies, including individuals.

To the plaintiff's third amended complaint a demurrer was sustained without leave to amend and

judgment was entered for the defendant, from which judgment an appeal was taken to the Supreme Court of the state where the judgment of the trial court was affirmed (*Alward* vs. *Johnson*, 208 Cal. 359). Thereafter the case was brought here upon a writ of *certiorari*, the petitioner contending the tax

(1) results in a grossly excessive valuation of his operating properties;

(2) that as applied, it is arbitrary, confiscatory and constitutes the taking of his property without due process of law;

(3) that the constitutional amendment itself by its express terms, applies only to common carriers, and that this petitioner in carrying United States mail is not a common carrier, and

(4) that it is a tax upon an agency of the federal government.

THE FACTS

The tax in question was levied by the state pursuant to the terms of section 15 of article XIII of the constitution of California. By virtue thereof, a person or company owning, operating or managing any automobile, truck, or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than buses used exclusively for the transportation of pupils to or from any public school when owned or operated by the school or school district, is required

to pay to the state a tax upon his or its operative property. That tax is in lieu of all other taxes and licenses, state, county and municipal, upon that property, and the amount of the tax is computed by applying a rate or percentage to the gross receipts from operation.

The rate or percentage applicable to a person or company engaged in the business of transporting property is 5 per cent; and the rate or percentage is 4¼ per cent in the case of a person or company engaged in the business of transporting persons, or persons and baggage, or persons and express.

Appellant does not claim that he is not a person within the contemplation of section 15 of article XIII. In his complaint it is alleged that he was, during the period in question, engaged in the business of operating an automotive stage line between fixed termini in this state bearing persons and property for compensation. The tax in dispute is the first installment of the state tax under section 15 of article XIII levied as of the first Monday in March, 1927, and measured by appellant's gross receipts from operation during the calendar year 1926. In that calendar year appellant's gross revenue from the carriage of passengers was $8,803.31; his gross revenue from the carriage of freight was $9,806.43; and his gross revenue from the carriage of United States mail and parcels post was $42,286.73.

It is then alleged (Tr., p. 2) that the State Board of Equalization levied a tax in the sum of $2,114.13

"on the gross income derived from United States mail"; that appellant paid one-half of that sum to the state under protest; and that this action is to recover the amount so paid.

Appellant then alleges that the actual market value of the operative property producing all of the aforesaid revenue did not exceed the sum of $15,000 (Tr., p. 3); that the operative property of appellant has no value in excess of the said actual market value; that the revenue other than that derived from the carriage of United States mail and parcels post is not sufficient to pay appellant's operating expenses; that the assessment made by the State Board of Equalization is confiscatory, arbitrary and excessive; that the tax rate on property generally, taxed on the *ad valorem* basis in the county in which appellant's operative property was situated, did not exceed 3 per cent per $100; that the said operative property of appellant was valued under the *ad valorem* system in an amount the tax on which never exceeded $350; and that appellant's operative property would have to be valued at $99,462.72 in order to justify the amount of the tax levied under section 15 of article XIII.

Finally, appellant alleges that in carrying the United States mail and parcels post he was acting under a contract with the United States government and for that purpose was an agency thereof; that the income derived from that source is not subject to a tax by the state; and that the tax to the extent that

it is based upon the revenue derived by appellant from that source is illegal.

The ground of respondent's demurrer to appellant's third amended complaint is that the latter does not state facts sufficient to constitute a cause of action against respondent or against the State of California.

ARGUMENT

Petitioner's argument may fairly be summarized in two main contentions:

(1) That the tax in its practical operation is contrary to the fourteenth amendment to the federal constitution in that it is excessive.

(2) That the tax is on a federal agency and therefore is violative of section 8, article I, of the federal constitution.

To these contentions the respondent replies as follows:

The Tax Is Not Violative of the Fourteenth Amendment.

The tax in question is a tax upon property. It is not a license tax or a tax for the privilege of engaging in the business of transporting persons and property for hire over the public highways.

The tax in question is similar to the state tax upon the operative property of a railroad company, for instance, which is taxed by the same gross receipts from operation method under section 14, article XIII of the state constitution. It is evident from a comparison of the language of sections 14 and 15

of article XIII that the former was used as a model in the preparation of the latter. For the convenience of the court section 15 is herewith quoted in full:

"Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, state or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies and each thereof, within this state.

All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to 5 per cent of the gross receipts from operations of such companies, and each thereof, within this state.

When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; provided, that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state.

The revenues from the taxes provided for in this section shall be deposited in the general fund and shall be applied and the same are hereby appropriated one-half to the State of California to be devoted exclusively to the maintenance and repair of public highways within this state; the remaining one-half shall be apportioned among

the respective counties of this state, in the proportion that the number of motor vehicles registered within such county for the preceding calendar year bears to the total number of motor vehicles registered in the State of California under the Motor Vehicle Act of such state for the preceding year, and such sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within such county. In the event that all other state revenues are at any time deemed insufficient to meet the annual expenditures of the state, there may be levied in the manner to be provided by law, a tax, for state purposes, on all the property in the state, including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township, or district on the first day of October, one thousand nine hundred and twenty-five. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes hereunder.

(b) All the provisions of this section shall be self-executing, and the legislature shall pass all laws necessary to carry this section into effect, and shall provide for the valuation and assessment of the property enumerated in this section, and shall describe the duties of the State Board of Equalization and any other officers in connection with the administration thereof.

The rates of taxation fixed in this section shall remain in force until changed by the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section.

(c) No injunction shall ever issue in any suit, action or proceeding in any court against this state or against any officer thereof to prevent or enjoin the collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such a manner and at such time as may now or hereafter be provided by law."

Prior to the adoption of section 15 of article XIII of the state constitution the State Supreme Court had frequently passed upon the provisions of section 14 of article XIII imposing state taxes on public utilties, measured by their gross receipts from operation, and such taxes had frequently been upheld as constituting property taxes upon the operative property of such companies.

In the case of

San Francisco vs. *Pacific T. & T. Co.*, 166 Cal. 244,

that portion of section 14 providing for state taxes upon the operative property of telegraph and telephone companies was upheld.

In

Pacific Gas & Electric Co. vs. *Roberts*, 168 Cal. 420, 176 Cal. 183,

that portion of the provision taxing the operative property of companies engaged in the transmission or sale of gas or electricity was upheld as a property tax.

In the following cases that portion of the constitutional provision taxing the operative property of railroad companies was upheld:

San Diego, etc., Ry. Co. vs. *State Board of Equalization*, 165 Cal. 560.

Lake Tahoe Ry. and Transportation Co. vs. *Roberts*, 168 Cal. 551.

County of San Bernardino vs. *State Board of Equalization*, 172 Cal. 76.

Southern Pacific Co. vs. *Levee District No. 1*, 172 Cal. 354.

Southern Pacific Co. vs. *Richardson*, 181 Cal. 280.

Pullman Co. vs. *Richardson and Walker D. Hines* vs. *Richardson*, 185 Cal. 484, 261 U. S. 330.

That portion of the constitutional provision taxing

the property of insurance companies for state purposes was upheld as a property tax in the cases of

Hartford Fire Ins. Co. vs. *Jordan,* 168 Cal. 270.
Hughes vs. *City of Los Angeles,* 168 Cal. 764.

That portion of the constitutional provision dealing with the taxation of corporate franchises, interpreted to mean "corporate excess," was upheld as a property tax in

Miller & Lux vs. *Richardson,* 182 Cal. 115.
People vs. *Alaska Pacific S. S. Co.,* 182 Cal. 202.
Pacific Coast S. S. Co. vs. *Richardson,* 186 Cal. 70.
Utah Construction Co. vs. *Richardson,* 187 Cal. 649.
People vs. *Ford Motor Co.,* 188 Cal. 8.
Schwab vs. *Richardson,* 188 Cal. 27.

The amendment to article XIII of the state constitution in 1910 was the first departure from the old and long established system of taxing property in proportion to its value. Section 14, which was added to article XIII by that amendment, provides for state taxes upon property which are not based strictly or directly upon the value of property as "value" is known under the *ad valorem* system. The plan of section 14, as stated by this court in

Bank of California vs. *Roberts,* 173 Cal. 398 (404).

is in various respects inconsistent with the idea that the property therein described shall be assessed in

proportion to its value. It is said that the taxes levied, while described as taxes upon the property, are not based upon any mode of ascertaining either the proportionate or the absolute value of such property. Further, it is said that it was not believed when section 14 was adopted that the method of taxation therein provided for should be limited or controlled by any general provision such as that theretofore contained in section 1 of article XIII requiring taxation in proportion to value.

This point seems to require emphasis, for in his complaint, as well as in his brief, the appellant refers to the tax in question as a tax "on gross receipts" and particularly "on the gross income derived from United States mail." This misconception of the nature of the tax levied under section 15 of article XIII sweeps away appellant's contention that the tax is violative of the fourteenth amendment.

It is not claimed by appellant that the tax was levied against property of the appellant located outside of the taxing jurisdiction of the state, therefore the due process of law clause in the fourteenth amendment has not been offended. It is not claimed by appellant that the tax is discriminatory or that the classification set up by section 15 of article XIII is improper; hence the tax does not contravene the equal protection of the law clause in the fourteenth amendment. Appellant was not engaged in interstate business and no interstate receipts are involved; hence the record in this case does not require that any

attention be given to the commerce clause in the federal constitution about which centered the entire controversy in the case of *Pullman Co.* vs. *Richardson*, 185 Cal. 484, 261 U. S. 330, upon which appellant so heavily relies.

Appellant's third amended complaint is evidently framed on the theory that there is no legal justification for a tax levied under section 15 of article XIII unless the amount thereof fairly approximates the amount of an ordinary tax upon property, but that theory pertains only to a case wherein a state undertakes to tax by the gross receipts from operation method a person or company engaged in interstate business as well as intrastate business. The fact that Pullman Company was doing an interstate business was the only reason for litigation instituted by that company against the state and the only reason for the discussion by this court of said theory. That was the only reason for the declaration by this court at the conclusion of its opinion in the *Pullman* case that

> "it will be unnecessary to consider or determine the extent to which the taxing power of the state may be exercised in the event that the burden upon the property of interstate commerce carriers is out of all reasonable proportion to that imposed upon the property of others within the state."

Even in the so-called King tax bill cases, 294 Fed. 742, filed against the State of California by Southern Pacific Company and by Atchison, Topeka and Santa

Fe Railway Company, which involved the commerce clause in the Federal Constitution, it was held by the United States District Court, Judge Dietrich presiding, that there is no requirement of comparative equality between the state tax burden upon the property of a railroad company and the average tax burden upon common property. The court held that there was no practical way of making the comparison there insisted upon by the carriers.

> *Atchison, Topeka and Santa Fe Railway* vs. *Collins and Southern Pacific Company* vs. *Collins*, 294 Fed. 742.

In the King tax bill cases an appeal was taken by each company to the United States Supreme Court and each appeal was thereafter dismissed at the request of the company.

That it would be impracticable and unnecessary to make the comparison of tax burden insisted upon by the railroad companies in the King tax bill cases is also pointed out in the cases of

> *State* vs. *Wells Fargo and Co.*, 179 N. W. 221.
> *State* vs. *Pullman Co.*, 179 N. W. 224.

What has already been said completely disposes of the entire line of cases cited by appellant, headed by the *Pullman* case, which center upon the commerce clause.

To repeat, appellant does not assert that section 15 of article XIII discriminates contrary to the fourteenth amendment, but there is no room for that

contention. That very point was raised in an injunction proceeding entitled

Bekins Van Lines et al. vs. *Ray L. Riley, as State Controller,* No. 2199-S,

filed in the District Court of the United States in and for the Southern Division of the Northern District of California, and a three-judge court sitting under section 266 of the Judicial Code, consisting of Federal Judges Hunt, Kerrigan and St. Sure, upheld the section against that attack, and dismissed the bill of complaint. Upon appeal to this court the judgment of the United States District Court was affirmed.

Bekins Van Lines et al. vs. *Riley,* 280 U. S. 80.

In its opinion affirming the judgment of the lower court this court said:

> "By this proceeding, instituted July 21, 1928, appellants ask that the constitutional amendment and the statute which undertake to lay such tax upon them be declared discriminatory and in conflict with section 1 of the fourteenth amendment; also, that an injunction issue against the State Controller forbidding him from attempting to enforce payment.
>
> Upon motion, without written opinion, the District Court—three judges sitting—dismissed the bill. The cause is here by direct appeal; and the only matter for our determination is the validity of the challenged classification.
>
> The power of a state in respect of classification has often been declared by opinions here. We

are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed.

Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost* vs. *Railroad Commission,* 271 U. S. 583 and *Michigan Public Utilities Commission* vs. *Duke,* 266 U. S. 570. Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by *Raymond* vs. *Holm,* 165 Minn. 215; *State* vs. *Le Febvre,* 174 Minn. 248; *Iowa Motor Vehicle Assn.* vs. *Board of Railroad Commissioners,* 207 Iowa 461; *Liberty Highway Co.* vs. *Michigan Public Utilities Commission,* 294 Fed. 703. Their use of the highways probably will be regular and frequent and, therefore, unusually destructive thereto. Also, it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers.

Although relied upon by counsel and said to be almost identical with the case at bar, *Quaker City Cab Co.* vs. *Pennsylvania,* 277 U. S. 389, gives no support to claim of undue discrimination. We regard the controversy as not open to serious doubt and further discussion of it seems unnecessary."

See, also,

Bacon Service Corp. vs. *Huss,* 199 Cal. 21, 275 U. S. 507.

In re Schmolke, 199 Cal. 42, 273 U. S. 646.

In the opinion of the State Supreme Court in the case at bar it was said:

"Appellant attempts to raise questions concerning the method of taxation adopted by the people of the state in 1910, by which the system of state and local taxation was separated, which were long ago settled against his contentions. He first asserts that the actual market value of the various units of property used in the operation of his stage line is not more than $15,000, and that prior to the adoption of section 15, *supra,* the ad valorem tax on his property never exceeded $350 per annum. He therefore claims that, as applied to his property, the prescribed method of taxation results in an arbitrary, excessive and confiscatory tax, violative of the fourteenth amendment to the federal constitution. He further contends that, inasmuch as the tax is not based upon the true valuation of his property, it ceases to be a tax on property and becomes a direct levy upon appellant's contract to carry mails for the United States government, and is, therefore, a tax on a federal agency. The question as to whether or not the taxes levied for state purposes by section 14 of article XIII, upon the gross receipts of the utilities there enumerated, are taxes upon property has several times been considered by this court, and in each instance it has been declared to be essentially a property tax. (*Pullman* vs. *Richardson,* 185 Cal. 484, 487 (197 Pac. 346), affirmed in 261 U. S. 330, 339 (67 L. Ed. 682, 43 Sup. Ct. Rep. 366, 368), and cases there cited).

(1) The tax required by section 15 of article XIII of the constitution on the gross receipts of appellant's business is the identical kind of a tax required by section 14, and is, like the other, essentially a property tax. It is neither arbitrary, excessive or confiscatory to the extent of rendering it violative of the due process clause of the fourteenth amendment to the federal constitution."

There is a wealth of adjudication establishing the constitutionality of a classification such as that found in section 15 of article XIII of the California constitution.

Bacon Service Corp. vs. *Huss*, 199 Cal. 21, 48 Sup. Ct. 158; 275 U. S. 507.

In re Schmolke, 199 Cal. 42, D. 47 Sup. Ct. 244, 273 U. S. 646.

Matter of Schuler, 167 Cal. 282.

Matter of Stork, 167 Cal. 294.

Northwest Auto Co. vs. *Hulbert*, 207 Pac. 161.

Raymond vs. *Holm*, 206 N. W. 166.

State vs. *Peterson*, 198 N. W. 1011.

Atlantic Coast Line R. Co. vs. *Doughton*, 43 Sup. Ct. 620, 624.

Quaker City Cab Co. vs. *Pa.*, 48 Sup. Ct. 553.

Louisville Gas & Electric Co. vs. *Coleman*, 48 Sup. Ct. 423.

Oliver Iron Mining Co. vs. *Lord*, 43 Sup. Ct. 525, 529.

Pacific Express Co. vs. *Seibert*, 142 U. S. 339, 351.

Magoun vs. *Illinois Trust & Savings Bank*, 170 U. S. 283 (293–297).

Ky. Railroad Tax Cases, 155 U. S. 321, 337.

There is no claim by appellant that the tax in question clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, in other words, "to spoliation under the guise of exerting the power of taxing."

Dane vs. *Jackson*, 256 U. S. 589, 599.

In appellant's third amended complaint it is alleged that the assessment made by the state board is "confiscatory, arbitrary and excessive" and does not take into consideration the actual value of appellant's operative property. However, as already observed, the tax under section 15, like the tax under section 14 of article XIII, is not strictly a tax on property according to its value, and furthermore the mere allegation that the assessment is confiscatory, arbitrary and excessive does not charge that which constitutes spoliation, against which the fourteenth amendment protects. Appellant has not cited a single case in support of his statement that the tax contravenes the fourteenth amendment. The Supreme Court of the State of California has held that a complaint which merely alleges that an assessment is excessive and arbitrary and fails to allege actual or constructive fraud or mistake does not plead a cause of action.

Miller & Lux vs. *Richardson*, 182 Cal. 115, 128.

It has been held by the Supreme Court of the United States that a state tax does not violate the fourteenth amendment merely because it is excessive in amount. An encroachment on private rights so clear and palpable as to leave no doubt that the attempted taxation by its necessary operation is really spoliation under the guise of exercising the power to tax must be pleaded and proved before relief can be had under the fourteenth amendment.

The Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322, 335.

This court has also held that a law imposing a tax is not repugnant to the constitution as being confiscatory because in an isolated case it may impose a hardship; and in the same case it is held that a tax on railway property measured by gross earnings is not confiscatory because the earnings of the railroad may not be sufficient to pay operating expenses.

Ohio Tax Cases, 232 U. S. 576, 203 Fed. 537.

It is fundamental that the power of taxation of each of the states over all persons and property within its jurisdiction is an inherent and not a delegated power and knows no limits except those imposed expressly or by plain implication in the federal constitution.

Vol. 26 R. C. L. Par. 63.

McCulloch vs. *Maryland*, 4 Wheat. 315.

State Tax on Foreign Held Bonds, 15 Wall. 300:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excise, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Bells Gap Rd. Co. vs. *Pa.*, 134 U. S. 232:

"We think that we are safe in saying, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation."

Henderson Bridge Co. vs. *Henderson*, 173 U. S. 592.

Wagner vs. *Baltimore*, 239 U. S. 207.

The Tax Is Not on a Federal Agency.

The tax imposed by section 15 is a tax upon all property used by the appellant in the said business. The amount of the tax is measured by percentages of the gross revenue from the transportation of persons and property. No provision is made in the section for the exclusion from the gross receipts base of the amount of revenue derived by a common carrier under a contract with the federal government for the transportation of mail and parcels post. The situation is precisely the same as that presented in the King tax bill cases where it was alleged and proved by Southern Pacific Company that it owned and operated under several federal franchises or grants of special privilege from the federal government.

The tax on a railroad company under section 14 of article XIII falls upon all property of every kind used by the company in its railroad business and necessarily includes intangibles, as well as tangibles, which in turn comprehend contract rights, whether called franchises or otherwise termed. The Southern Pacific Company contended that the state tax in its practical operation fell directly upon its federal franchises, and that the tax was therefore void for the reason first declared in *McCulloch* vs. *Maryland*. The United States District Court held that the contention was unsound,

> *Southern Pacific Company* vs. *Collins*, 294 Fed. 742, 744.

citing

Chicago, etc., Co. vs. *Babcock*, 204 U. S. 585, 597.

Western Union Tel. Co. vs. *Caggart*, 163 U. S. 1.

Central Pacific R. R. Co. vs. *California*, 162 U. S. 91.

Since it is legal to include in the gross receipts tax base revenue derived by a railroad company from the exercise of federal franchises in conjunction with the use of its other operative property, it would seem to follow that it is legal to include in the gross receipts tax base of a common carrier over the public highways revenue derived by it from the performance of service under a contract with the federal government.

The contract between the appellant and the federal government is not taxed by section 15 of article XIII. That section imposes a tax upon property—property which is used in a particular way, to wit, in the transportation of property and persons for hire over the public highways between fixed termini or over a regular route. It might have been sound policy for the people in framing that section to have excluded from the gross receipts base revenue derived from carrying mails under a government contract such as was made, for instance, in chapter 412, Statutes of 1925, section 9½, which statute was the subject of controversy in the case of

In re Schmolke, supra.

Of course it is recognized that a state may not

burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions.

Panhandle Oil Co. vs. *Miss.*, 48 Sup. Ct. 451.

But the doctrine of immunity of a federal agency from state taxation does not extend beyond the reason which underlies it.

> "It can not be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject-upon which federal taxes may be laid. The states are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

Union Pacific Railroad Co. vs. *Peniston*, 18 Wall. 5, 30.

In its opinion upon this branch of the case the State Supreme Court in the case at bar said:

> "(2) The second main contention of appellant is that he carries the United States mails and

parcels post under a contract with the Postoffice Department of the United States Government, and for that purpose is an agency of the government and, as such, immune from state taxation. He cites cases in which the courts have denied the state the right to collect taxes upon transactions in which the federal government is directly engaged (e. g., *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218 (56 A. L. R. 583, 72 L. Ed. 857, 48 Sup. Ct. Rep. 451)). But there is a very material difference between such transactions and one in which a private citizen, whose only relation to the government is that of contract, is under obligation to furnish service in accordance with that contract. 'Mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control.' (*Metcalf and Eddy* vs. *Mitchell*, 269 U. S. 514 (70 L. Ed. 384, 46 Sup. Ct. Rep. 172, 174, 175).) In that case, involving a tax on the income of consulting engineers in state service, the court, speaking through Mr. Justice Stone, said: '------ not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. (Citing cases.) * * *

'It seems to us extravagant to say that an independent private corporation for gain created by a state is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work

for which it is employed is important and takes much of its time.'

In Union Pac. R. R. Co. vs. *Peniston,* 18 Wall. (85 U. S. 5) 33 (21 L. Ed. 787, see, also, Rose's U. S. Notes), it was claimed that the state of Nebraska had illegally imposed a tax upon the property of the railroad company, the contention being that the property was exempt from state taxation by virtue of the incorporation of the company by the United States as a means for the performance of certain public duties of the government, enjoined and authorized by the constitution. In considering the contention, the court said: 'It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service.

* * * * *

They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to

contribute to the revenue of the states it is manifest the state governments would be paralyzed.' "

Petitioner relies upon the case of

Panhandle Oil Co. vs. *Miss.*, 277 U. S. 218,

where an attempt was made by the state to collect from a distributor of motor vehicle fuel the tax of one cent on each gallon of fuel sold by the distributor to the federal government for the use of its coast guard and the Veterans' Hospital. In that case it was held that the necessary operation of the statute was directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the coast guard fleet and the Veterans' Hospital.

Here, as we have already noted, we are concerned not with a privilege or excise tax, such as was involved in the Mississippi case, but with a tax on property; the tax is not on the contract between petitioner and the federal government but upon the property used in conducting the kind of business specified in section 15 of article XIII of the constitution; and any interference that there may be with the functioning of the federal government is extremely indirect and too remote fairly to be regarded as that kind of interference against which the federal government is protected by the federal constitution.

Metcalf & Eddy vs. *Mitchell*, 269 U. S. 514.

In considering whether section 15 of article XIII interferes with the discharge of a function of the

federal government it would seem that consideration should be given not only to the fact that the tax thereby imposed is a tax upon property devoted to a peculiar use, but also to the fact that the tax is upon property which is being used for compensation over the public highways and to the fact that the revenues derived from that tax are appropriated one-half to the state for maintenance of public highways and one-half to the counties for the maintenance of public highways. In this connection consideration should also be given to the fact that under the terms of the Federal Highway Act (39 Stat., p. 355) federal moneys are made available to the states for the purpose of constructing public highways, and of course, one of the primary purposes of that appropriation is to enable the federal government to better perform its duty, under section 8, article I of the federal constitution, of establishing post offices and post roads.

The tax here in question, as we have already said, is not an excise or license tax, but a tax upon property used in a particular manner, and it is merely an incident that the property happens to be used in this instance in the carrying of government mail.

This court has long recognized the distinction between taxing income and using income as the measure of a tax upon property.

Flint vs. *Stone Tracy Co.*, 220 U. S. 107.
Macallen Co. vs. *Massachusetts*, 279 U. S. 620.

The case of *New Jersey Bell Telephone Co.* vs. *State Board*, 280 U. S. 338, upon which appellant

relies here, is readily distinguished. In that case the tax in question was not a lien tax on all property of the company or in fact of any property but only in lieu of other franchise taxes. This court held that the tax was not a tax on property nor in substitution for or in lieu of a property tax, but that it was a direct tax on gross receipts derived from the telephone company's *interstate commerce* and as to that part, at least, it was void.

The tax here in question is, by the State Constitution, "in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies."

Nor is the tax exorbitant, as appellant claims, merely because it is out of proportion to that imposed upon the property of others within the state.

Pullman Co. vs. *Richardson, supra.*
Southern Pacific Co. vs. *Collins*, 294 Fed. 742.
Bekins Van Lines vs. *Riley*, 280 U. S. 80.

As this court remarked in the case last cited above, the use of highways by common carriers probably will be regular and frequent and, therefore, unusually destructive thereto, as well as exposing the public to dangers exceeding those consequent upon the occasional movements of other carriers.

Appellant's operations over the public highways of the state are destructive of such highways in proportion to the revenues received by him from such operations. Ordinary property, such as real estate

and the improvements thereon, do not destroy public property or make necessary its constant upkeep and repair as is requisite in the case of public highways maintained by the state.

Appellant states in his supplemental brief (p. 4) that he is not objecting to the method of taxation but rather to the manner in which it is applied to him. If the method is not subject to objection then the fact that the manner of its application to appellant seems to impose a hardship upon him is an insufficient basis for declaring the law to be invalid.

The Michigan Telephone Tax Cases, 229 U. S. 322.

Ohio Tax Cases, 232 U. S. 576.

Miller & Lux vs. *Richardson*, 182 Cal. 115.

Bells Gap Rd. Co. vs. *Pennsylvania*, 134 U. S. 232.

Henderson Bridge Co. vs. *Henderson*, 173 U. S. 592.

Alcaraz vs. *Johnson*, 208 Cal. 359.

We think we are justified in saying that it is demonstrated herein that the tax here in question (a) is a tax on property used in a particular way, and that it is not a tax on income; (b) that it is not a tax on a government contract nor upon an agency employed by the federal government in the exercise of its constitutional powers.

Appellant having failed to show that the tax complained of violates any provision of the federal or

state constitution, it is submitted that the judgment of the Supreme Court of the state should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the
State of California,
H. H. LINNEY,
Deputy Attorney General,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 41.—October Term, 1930.

Leslie T. Alward, Petitioner,
vs.
C. G. Johnson, Treasurer of the State of California.

On Writ of Certiorari to the Supreme Court of the State of California.

[February 24, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

A tax reckoned, as required by the State Constitution, upon gross revenues derived from an automotive stage line operated by him during the year 1926 between fixed points in California was assessed against petitioner Alward. He paid one-half, $1,489.39—the first installment—and then brought suit in the Superior Court of Sacramento County to recover $1,057.16, the amount imposed because of receipts under his contract for carrying the mails. He asked judgment for that amount, together with costs, further relief, etc.

Section 15, Article XIII, of the California Constitution, adopted November 2, 1926, provides—

> "Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, . . . shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.
>
> (a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is

transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

"All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state. . . .

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; . . ."

The court below declared that the tax prescribed by the foregoing section of the Constitution is identical in kind with the one inaugurated earlier by Section 14, which applies to railroad, telegraph, telephone, etc., companies. Under both Sections taxes are laid according to gross receipts.

The complaint alleges in substance:

The plaintiff is engaged in the business of operating an automotive stage line between Redding and Big Bear, Calif., by virtue of a contract entered into with the Post Office Department. The mails are carried by motor vehicles.

The gross income derived from operating the line during 1926 follows: From carriage of passengers, $8,803.31; from carriage of freight, $9,806.43; from carriage of United States mail, $42,286.73.

Based upon these receipts, the following tax was assessed for the year 1927: On gross income from passengers, $374.14; from freight, $490.32; from United States mail, $2,114.32. He paid one-half of the total sum so assessed—the first installment.

In earning this revenue, plaintiff employed certain designated automotive property, and no other, the actual market value of which did not exceed $15,000. This was devoted

chiefly to carrying the mails and had no value in excess of its actual market value; plaintiff's ability to earn more with it than other persons could with the same amount and character of property arose solely from the fact that he had a contract with the United States Government for carrying the mails. Without this the stage line could not be operated profitably.

The assessment against the plaintiff is confiscatory, arbitrary, excessive and does not take into consideration the actual value of the property involved and was made without consideration of any element of value except the gross earnings. The tax rate on property assessed on an ad valorem basis in the counties where plaintiff operates did not exceed three per centum. Replacement value of all property used by him does not exceed $15,000. In carrying the mails he acted under a contract with the Post Office Department and was an agency of the United States not subject to local taxation.

The assessment, in so far as based upon the revenue derived from carrying the mails, was unlawful and the portion of the first installment reckoned thereon and paid by plaintiff was unlawfully exacted.

The trial court sustained a demurrer to the complaint; its judgment was affirmed by the Supreme Court. The latter held that the tax assessed against the petitioner is essentially one on property and is neither confiscatory, nor so arbitrary as to impair any right under the Federal Constitution. Also that the petitioner did not, through his contract to carry the mails, become an agency of the Federal Government immune from taxation computed according to gross receipts.

The record discloses no question relative to taxation of property outside the State or interference with interstate commerce.

The Supreme Court of the State has declared the tax to be one upon property. The history, purpose and effect of the constitutional provision under consideration have been pointed out in the opinions of that court. *San Francisco* v. *Pacific T. & T. Co.*, 166 Cal. 244; *Pacific Gas & Elec. Co.* v. *Roberts*, 168 Cal. 420; *Lake Tahoe Ry. Co.* v. *Roberts*, 168 Cal. 551. Also by this court in *Pullman Co.* v. *Richardson*, 261 U. S. 330, and *Hopkins* v. *Southern California Tel. Co.*, 275 U. S. 393.

The California Constitution divides property within the State for taxation purposes into several classes and provides for different burdens upon them. There can be no doubt of the general power of a state where there is reasonable ground therefor to classify property wholly within her limits and to lay an appropriate tax upon each class. *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 82. It is not possible for us to say that the circumstances of the present cause disclose any arbitrary or unreasonable exertion of such power by the State. The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough. Here the tax laid was exclusive of all other taxation and the funds arising therefrom were assigned to the maintenance of roads, essential to petitioner's operations.

Certainly, petitioner is in no position to complain of an arbitrary exactment. The prescribed method of assessment was permissible and the mere fact that he was required to pay a higher rate upon property devoted to his peculiar business than was demanded of property not so employed is unimportant.

Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. *Union Pac. Ry. Co.* v. *Peniston*, 18 Wall. 5, 30; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. The facts in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, and *New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.

The judgment of the court below must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.